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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS.

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Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS.

NATURE OF APPEAL.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, handed down on June 29, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, in favor of the respondents, denying the appellant a permanent injunction to enjoin the respondents from engaging in peaceful picketing and advertising growing out of a labor dispute.

STATUTES INVOLVED.

It is asserted by the appellant that this appeal draws into question the validity of the entire Wisconsin Labor Code, Sections 103.51, 103.63, Wisconsin Statutes 1935. We should like to call to the Court's attention that the only pertinent sections under review here are Section 103.53, entitled, "Lawful Conduct in Labor Disputes," and Section 103.62 (3), entitled "Definitions." Under 103.62 (3) the Court determined that the term "Labor Dispute" includes a dispute between an employer and members of a labor organization engaged in the same trade, craft or industry as such employer. The Court then having determined that the controversy out of which this litigation grew was a labor dispute under 103.62 (3), applied the provisions of 103.53, which defines lawful conduct in labor disputes, and further provides that no court shall have jurisdiction to issue any restraining order or temporary or permanent injunction which would prohibit any person or persons from doing any of the aforedefined legal acts in furtherance of such labor dispute. This appeal then does not involve the entire labor code. While in the state court an attack was made on certain other provisions of the code on the grounds that such provisions are in violation of the Wisconsin Constitution, that question was determined adversely to the appellant, and so is no longer subject to review in this court, no federal question being involved.

MATERIAL FACTS.

The appellant, Paul Senn, first learned the trade of tile setting in Miami, Florida, in 1930, during which year he worked approximately two weeks as a helper and eight

months as a tile setter (R. 48). In 1931 he came to Milwaukee and entered into the tile laying business under the name of Paul Senn & Co., an unincorporated firm, and started to solicit work as a plastering and tile setting contractor (R. 49). Previous to this time he had been a plastering contractor (R. 47, 48).

One of his first acts upon starting business in Milwaukee was to confer with Mr. Melville, president of the Tile Setters Union, Local 5, relative to co-operating with union regulations in the tile setting industry. At that time the union had no formal contracts with the various other employers and contractors in the city, but did have what might be considered "gentlemen's agreements" regarding the hiring of union labor and complying with union rules. The appellant agreed to co-operate (R. 85). Later, upon visiting one of the jobs on which Mr. Senn was employed, Mr. Melville discovered that he was not working under union rules, since he (Mr. Senn) was working as a nonunion helper with a union journeyman, and also employed another nonunion man, his brother, to help on the job. He was informed of the facts but did nothing to correct them (R. 39-41, 86, 88).

The labor history of appellant over the period of years, starting with 1931 and until 1935, when the dispute with respondents became acute, indicates that no attempt was ever made to conform with union rules and regulations, either in number of hours worked (R. 70), or Sunday employment (R. 71), or in payment of the union scale of wages (R. 71, 73-76). The record further indicates that he employed his brother and used him as a helper approximately 10 per cent of the time (R. 69; Old Record 141-142); that he entered into a partnership with William Neidner, a union journeyman, who gave up his membership in order to enter into the partnership (R. 70), and for

the past two and a half years he has employed Arnold Holly, a suspended union member, knowing of Holly's suspension and the reasons therefor (R. 70-71). The question of Holly's reinstatement into the union as a condition precedent to Senn entering into the contract is a basis of dispute in the record (R. 34-35, 54, 58).

During the entire period that the plaintiff was engaged in the tile contracting business a great deal of his time was devoted to working either as a helper or a tile setter, performing work within the scope of the journeyman's craft (R. 49, 50; Old Record 84, 86-89, 177). Most of the work he did was that of a tile setter. From May, 1934, to May, 1935, out of a total of 1,777 hours on jobs, he attributes 771 hours to himself, or 40 per cent (R. 51, 53).

After the original negotiations which took place when appellant entered into the contracting business the record shows that there were occasional conferences with union officials. Finally, in March, 1935, the proposed contract was submitted to Mr. Senn, who refused to sign it because of article 111; a series of conferences was to no avail (R. 37), and in December, 1935, the Tile Layers Protective Union, Local No. 5, started to picket his premises, which are his home and office, and to follow his truck from his garage to his jobs to ascertain where those jobs were, for the purpose of picketing (R. 40-41). The pickets varied in number from two to four, picketed only on working days, and used no violence (R. 63, 64). Senn decided on meeting this economic pressure by counter activities; he decided to go into the brokerage business and sell tile indiscriminately to any buyers and thereby "wreck" the industry (R. 41, 62, 72-73). In pursuance of this plan he sent letters to contractors and inserted a "blind ad" in the Milwaukee Journal (R. 72-73).

During the period of 1931 to 1935 the tile industry in

Milwaukee had been in a very poor condition (R. 76-77, 83, 86), and this condition had been further aggravated by unskilled persons and others starting to compete in the trade and going into the contracting business (R. 38, 87). Membership in the tile layers' union decreased from 112 in 1929 to 41 in 1935 (R. 90).

It was because of these conditions that the local union adopted the rule which was incorporated in the proposed contract as article 111 (R. 87, 90). In co-operation with the union at least seven tile contractors, constituting the greater majority of them, entered into the contract. In all of these firms recognized craftsmen, who would have been eligible to membership in the union if they were not employers, but who were partners in or owners of the contracting firms, abided by article 111 of the contract (R. 43, 87).

As to Mr. Senn's qualifications as a skilled craftsman in the tile-laying industry, there is no dispute about the fact that he has fulfilled none of the requirements of the union's by-laws. He has not served the required apprenticeship nor pursued the course of study required to entitle him to be recognized as a practical tile setter (R. 66-68). While there is testimony by himself and his employee that his work is satisfactory, the record also shows that the only building contractor who testified as to his skill admitted that he had never seen Senn do what is considered highly skilled or technical work (Old Record 196-197), and further testimony by veteran members of the union that one with Mr. Senn's limited training and experience could not be considered a practical mechanic (R. 95-96; R. 100-101). Senn was advised of this during the negotiations with the union and was told that under such circumstances the union could not allow its members to work for him if he

persisted in working with the tools of the trade (R. 34, 79, 84).

The defendant unions are allied with a larger International Union comprising a number of building trades crafts. All these crafts require services as an apprentice before a man may be considered a journeyman craftsman entitling him to do the work of a practical mechanic (Constitution, pages 68, 69, 70).

The Wisconsin Labor Code, Sections 103.51 to 103.63, Statutes of 1935, set out in the appendix, enumerates what is to be considered lawful conduct in labor disputes. Such lawful conduct is defined as including giving publicity and information regarding the existence of a labor dispute, ceasing to patronize or to employ any person or persons, and peaceful picketing and patrolling. The act defines labor disputes, and further provides that restraining orders shall be issued under certain circumstances and for limited periods, and that injunctions shall not be issued except after a hearing had and certain facts found to exist. The facts to be found are:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of Section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

After due trial the Court found that the facts in the instant case established that there existed a labor dispute; that the acts and conduct of respondent union were lawful and in furtherance of such lawful labor dispute, and that the appellant was not entitled to relief. The Court specifically found that the objects of the union in its dispute with the appellant were as follows (R. 28):

15. "That the tile industry for some years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with nonunion tile setters and helpers in their effort to secure work as a means of livelihood; that for the purpose of enhancing the interests of the defendants and their members, the defendants and their members have found it necessary for the protection of their individual rights in the prosecution of their trade to require of all employers agreeing to conduct a union shop to agree: 'That no individual, members of a copartnership or corporation engaged in the tile-contracting business shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers Protective Union.'

16. "That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to membership in the defendant unions; that the Constitution and Rules of the defendant unions require among other things that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of

service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions."

From these facts it was concluded that in furtherance of such objects:

"1. That a labor dispute exists between the plaintiff and the defendants respecting the unionizing of plaintiff's business on the terms proposed by the defendants; that the plaintiff and defendants are parties to said dispute, and that such dispute is within the definition of a labor dispute as defined in the Labor Code, Sections 268.18 to 268.29 (now Section 103.51-103.63), and subsections thereof, of the Wisconsin Statutes.

"2. That it is not unlawful for the defendants, in furtherance of said dispute, to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of fact involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace or threat thereof.

"3. That the defendants have not indulged in violence or fraud; that because of their statement made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful acts will be committed or will be executed or continued.

"4. That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"5. That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.

"6. That the plaintiff is not entitled to the relief prayed for in his complaint.

"7. That the above-entitled action be dismissed on its merits without costs."

From such findings an appeal was taken based upon whether (1) the term "labor dispute" was applicable to a situation where the dispute was between members of a union engaged in the same craft or industry and an employer engaged in such trade, craft or industry, and (2) if such dispute existed, were the demands made upon the employer reasonable ones? It was contended by appellant that to find a dispute existed, and that the demands made were reasonable, and upon such findings to deny appellant a remedy by way of injunction is to deny the appellant the equal protection of the laws, and to deprive him of his property without due process of law. The Wisconsin Supreme Court affirmed the findings of the trial court, and from this decision this appeal was taken.

ERRORS ASSIGNED BY APPELLANT.

The seven assignments of error appearing on pages 6, 7 and 8 of brief of appellant may be summarized as follows:

(1) That Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935 (which will hereafter be referred to as the Wisconsin Labor Code), as construed by the Supreme Court of the State of Wisconsin, deprive appellant of property without due process of law;

(2) That the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, denies appellant equal protection of the laws;

(3) That because appellant's employees were not members of the defendant unions, therefore to deny appellant relief from picketing was to deprive him of liberty and property without due process of law and to deny him the equal protection of the law.

The foregoing contentions are based on the Fourteenth Amendment to the Federal Constitution.

PRELIMINARY STATEMENT.

LAWS SIMILAR TO THE FEDERAL ACT KNOWN AS THE NORRIS-La GUARDIA ACT, AND THE WISCONSIN LABOR CODE, WHICH IS PATTERNED AFTER IT, HAVE BEEN ENACTED BY OTHER STATES SINCE THE PASSAGE OF THE FEDERAL ACT. THE QUESTION ON CONSTITUTIONALITY HAS BEEN BROUGHT TO THE ATTENTION OF FEDERAL AND STATE COURTS. UNDER VARIOUS FACTS IT HAS BEEN HELD THAT THE ACTS DID NOT DEPRIVE THE AGGRIEVED PERSONS OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THAT SUCH ACTS DID NOT DENY TO THE AGGRIEVED PERSONS THE EQUAL PROTECTION OF THE LAWS; THAT SUCH ACTS, WHEN CONSTRUED AS TO INCLUDE WITHIN THE DEFINITIONS OF A LABOR DISPUTE ORGANIZATIONS OF EMPLOYEES AND AN EMPLOYER WHOSE EMPLOYEES WERE NOT MEMBERS OF THE ORGANIZATION OF EMPLOYEES, AND WHEN THE CONTROVERSY WAS OVER UNIONIZATION, DID NOT DEPRIVE THE AGGRIEVED PERSONS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW OR DENY TO SUCH PERSONS THE EQUAL PROTECTION OF THE LAWS.

It would afford an interesting subject for discussion, and a pertinent one, if a complete analysis were made of the historical antecedents of the present legislation. We refrain from doing so because of the many pages it would consume and because it is quite extensively referred to in the Congressional Committee Reports. For the con-

venience of the Court we have prepared, and submit herewith, a separate "appendix" including these reports.

We do, however, wish to direct the Court's attention that since the enactment of the federal act in 1932 (29 U. S. C. A., pars. 101-115, referred to in this brief as the Norris-La Guardia Act), the Legislatures of seventeen states have enacted similar or identical legislation with respect to state courts. Wisconsin was the only state to have enacted its law prior to the enactment of the federal act, although it is drafted on the basis of the federal act which was then pending before Congress. To date the following states, some of them with slight modifications, most of them in substantially identical language, have enacted, with respect to their own courts, legislation of the nature of the Norris-La Guardia Act: **Oregon** (Ch. 355, Oregon Laws 1933), **Colorado** (Laws of 1933, Ch. 59), **Idaho** (Laws of 1933, Ch. 251), **Washington** (Extra Session Laws of 1933, Ch. 7), **Indiana** (Laws of 1933, Ch. 12), **Louisiana** (Act No. 203, Louisiana Regular Session 1934), **Maryland** (Laws of 1935, Ch. 574), **Massachusetts** (Laws of 1935, Ch. 407), **Minnesota** (Minnesota Laws, Ch. 23, Secs. 4260-1 to 4260-15, inclusive), **New York** (Laws of 1935, Ch. 477), **North Dakota** (Laws of 1935, Ch. 247), **Pennsylvania** (Act No. 311, Laws of 1931—modified by including "yellow dog" contract provision, Act No. 219, Laws of 1933), **Wisconsin** (Wisconsin Statutes 1933, Secs. 268.23 to 268.30, inclusive, now numbered 103.51 to 103.63), **Wyoming** (Laws of 1933, Ch. 37), **California** (Act 4104, Deering's Laws of 1933), **Utah** (Revised Statutes 1933, Secs. 49-2-6 to 49-2-7, inclusive), **Illinois** (Smith-Hurd Revised Statutes 1933, Ch. 48, Sec. 2-a).

It is interesting to note that in the short space of time since the enactment of the foregoing statutes by the various states enumerated, contentions respecting constitu-

tionality, in some cases identical with those made by appellant in this case, were made before federal courts and before courts of the states enumerated, and with the exception of one state, Washington (a decision based on its own Constitution), the enactments have been held constitutional.

Levering & Garrigues v. Morrin, 71 Fed. (2d) 284 (certiorari denied by the United States Supreme Court, 239 U. S. 594, 79 L. Ed. 687);

Dehan v. Hotel & Restaurant Employees (La. App.), 159 So. 637;

Aberdeen Restaurant Corpn. v. Gottfried, 285 N. Y. S. 832;

Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 215 Wis. 623, 256 N. W. 56 (Code construed although question of constitutionality not raised);

Fenske Bros. v. Upholsterers' Union (Ill.), 193 N. E. 112;

Cinderella Theatre Co. v. Sign Writers' Local Union, 6 Fed. Supp. 164;

Stanley v. Peabody Coal Co., 5 Fed. Supp. 612;

Knapp-Monarch Co. v. Anderson, 7 Fed. Supp. 332;

United Electric Coal Co. v. Rice, 9 Fed. Supp. 635;

U. S. v. Weirton Steel Co., Inc., 7 Fed. Supp. 255;

Miller Parlor Furniture Co., Inc., v. Furniture Workers Union, 8 Fed. Supp. 209;

Starr v. Laundry & Dry Cleaning Workers Union, 63 Pac. (2) 1104 (Oregon 1936);

George B. Wallace et al. v. National Association of Mechanics et al. (decided at same time as Starr case, supra);

American Furniture Co. v. I. B. of T. C. & H. of A. et al. (Wis.), 268 N. W. 250.

There are other pertinent cases bearing on the consti-

tutionality of the foregoing laws, but which were decided prior to their enactment:

Greenfield v. Central Labor Council, 104 Ore. 236;
Blumauer v. Local Union No. 159, 141 Ore. 399;
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;
Kronowitz v. Schlansky, 282 N. Y. 564;
Holden v. Hardy, 169 U. S. 366;
Knoxville etc. Co. v. Harbison, 183 U. S. 13;
Patterson v. Bark Eudora, 190 U. S. 169;
McLean v. Arkansas, 211 U. S. 539;
Bunting v. Oregon, 243 U. S. 246;
Texas & N. O. R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548.

ARGUMENT.

Appellant bases the errors alleged on the holding of the Wisconsin Supreme Court that the inclusion of article III in the proposed agreement and the request that the appellant comply therewith was a reasonable and just one, and directed to the legitimate objects for which workingmen may organize; and that the controversy arising out of such request constitutes a legitimate labor dispute, and that the activities permitted by Section 103.53 of the Wisconsin Statutes (1935) in furtherance of such dispute are lawful.

In the accompanying brief, written on the subject of jurisdiction only, we have endeavored to point out that the reasonableness and purpose of article III of the proposed agreement involved an issue of fact, and that the finding of the trial court, approved by the Supreme Court of the State of Wisconsin, is conclusive upon this Court. But since the attack upon constitutionality of the Wisconsin Labor Code is made on the construction of the Act as applicable to the factual situation in the case at bar, we shall proceed to discuss the reasonableness of article III of the proposed agreement and the request for compliance therewith by appellant.

I.

THE CONTROVERSY IN THE CASE AT BAR IS A LABOR DISPUTE OVER UNIONIZATION. THE TYPE OF CONTRACT OFFERED AND THE UNION RULES ARE DIRECTED TOWARD THE LEGITIMATE PURPOSES FOR WHICH WORKINGMEN ARE ALLOWED TO ORGANIZE. SINCE THE ACTS IN FURTHERANCE OF THE DISPUTE ARE PEACEFUL, THE REFUSAL OF THE TRIAL COURT TO ISSUE AN INJUNCTION WAS PROPER.

A.

The Controversy in the Case at Bar Is a Labor Dispute Over Unionization Upon Terms and Conditions Prescribed by the Union Regulating Wages, Hours, and Requiring Compliance With the Provisions of the Proposed Contract That Contractors Shall Abstain From Personally Working With the Tools of the Trade. The Inclusion of Such Provision by the Union Is in Furtherance of the Legitimate Interests of Its Members and Arises Out of the Necessities Required for the Protection of Their Individual Rights in the Prosecution of Their Trade.

The findings in this case are to the effect that the respondent labor unions are engaged in unionizing their trade or business for the protection of their wages, hours and working conditions. In furtherance of unionization the respondents found it necessary, because of the peculiar composition of their craft, which consists of employers with small numbers of employees, to require that employers who wish to be unionized abstain from working with

the tools of the trade. This rule has been in force for some years and all union employers within the craft are unionized on that basis. The respondents offered to unionize the apppellant on the same basis, but he has refused. **The respondents do not deny, as will be hereafter pointed out in greater detail, that it is the right and privilege of appellant to refuse to operate a union shop, nor do they deny that it is his right and privilege to refuse to sign the agreement with article III in it.** Their concession in this regard is the same as they concede that it is appellant's right to refuse to pay the wages set forth in the agreement or to conform to the hours provided therein. Respondents contend, however, that, because of appellant's refusal, it is their right to classify him as a nonunion contractor and to advertise that fact to the public by acts and conduct which are declared to be lawful under the laws of the state and Wisconsin Labor Code. In respect to the legality of the efforts of a labor union "to unionize an entire trade or business" and picket the premises of an employer with the intent of inducing him to unionize his place of business, the Court of Appeals of the State of New York, in the case of **Exchange Bakery & Restaurant v. Rifkin**, 245 N. Y. 260, holds:

> "The purpose of a labor union to improve the conditions under which its members do their work, to increase their wages, to assist them in other ways, may justify what would otherwise be a wrong. **So would an effort to increase its numbers and to unionize an entire trade or business.** It may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the

single shop. Unions believe that wages may be increased, collective bargaining maintained, only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. **Picketing without a strike is no more unlawful than a strike without picketing**. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured." (Emphasis ours.)

On the principles thus enunciated by the New York Court of Appeals the Norris-LaGuardia Act was framed. See "**The Labor Injunction**," Frankfurter and Greene (Macmillan Company, 1930), pages 215, 216:

> "A word may be appropriate concerning the rationale of the general scheme thus proposed, before reviewing the specific activities that, by section 4, are excepted from the reach of an injunction. It is an attempt to recognize frankly that the central problem of the law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of 'self interest.' How far laborers may combine to strike for concessions that are not of immediate benefit to them but which strengthen the union organization; **how far a union in one craft may use its power to achieve the unionization of nonunion plants within the same craft**; how far a union of one craft may exert its power in aid of unions of another craft, and how dependent one craft must be upon the other to justify co-operative tactics—these and like issues are the crucial ones. Section 9 of the proposed bill settles all of these questions so far as application for equitable relief is concerned. Immunity from injunctions extends to all the categories that we have

described, save alone as to persons who are not engaged in the same industry with the complainant. What occupation, craft or trade is within, or outside of, a particular industry is necessarily left for individual decision. The obvious change intended by section 9 is to extend the area of unrestrainable conduct beyond the limits now recognized by federal decisions. The interpretation given to the Clayton Act by the **Duplex Case**, to the effect that the privileges of that Act may be invoked only in a dispute between an employer and **his** employees, is thus rendered innocuous. So much for the meaning of the new proposals." (Emphasis ours.)

In the book "The Labor Injunction," aforereferred to, is appended a copy of the proposed Norris-LaGuardia Act, and the foregoing relates to a discussion of the definitions of labor disputes similar to the language contained in 103.62 and subsections of the Wisconsin statutes. The Norris-LaGuardia Act and the Wisconsin Labor Code were premised on the same legal principles as those expressed in the decision of **Exchange Bakery & Restaurant v. Rifkin**, supra.

(1) *Appellant confuses the issue by failing to recognize that the respondents have rights, and may maintain them, though they conflict with the rights of the appellant.*

Appellant confuses the issue by assuming that respondents are depriving appellant of his right to the "free use of his hands." They are doing no such thing; they are informing the public that he is a nonunion contractor and they appeal to the public not to patronize him. It is their right to make such appeal as much as it is his to work with his hands.

Neither do the respondents question the right of the

appellant to work at his own business with the tools of the trade as a nonunion employer. We have previously asserted that that is his right. The confusion arises from the appellant's incorrect approach. Appellant's case is based on the proposition that we are asserting appellant has no right to work with the tools of the trade. He has that right, but because he has that right we are not deprived of our right to demand that he operate as a union contractor and not work with the tools of the trade. His refusal brings the appellant and the respondents into conflict, which conflict is a labor dispute. Let us see if we can make ourselves clearer. The appellant has the absolute right to refuse to unionize his plant on the demand that he pay the wage scale set forth in the agreement submitted to him, but the unions have the absolute right to demand that he unionize on the basis that he pay that wage scale. His refusal creates a labor dispute. The appellant has the absolute right to refuse to unionize his plant on the basis of working his employees the hours prescribed in the agreement submitted to him, but the union has the absolute right to request that he unionize on the basis of those hours. This refusal creates a labor dispute.

If the fact that appellant has the right to do a certain thing renders illegal the demand that he do otherwise, then the respondents cannot have a labor dispute respecting any demand which the appellant has a right to refuse. But this is not the law. We believe that if the appellant fully appreciated the principle involved in the foregoing, that is, conflict of rights and the right of each to maintain their position and the right of each to engage in lawful economic persuasion to induce the other to yield, the fallaciousness of appellant's argument would at once become apparent. This rule is clearly announced in the

case of **New Jersey Painting Company v. Local 26**, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384:

> "Economically the conclusion reached by the lower court **confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights.**"

It is the position, which the respondents here take and is a reiteration of respondents' claim that they are not denying to the appellant any rights which he asserts under the Constitution or the law of the land. The respondents are asserting their own rights, secured to them by common law and the Wisconsin Labor Code, and in the assertion of those rights are using all of the legal means at their disposal.

(2) *Many cases establish the rule to be as contended for by respondents, i. e., if the requests are related to the legitimate interests of the union, they are legal. Such interest is the securing of work for themselves in competition with others, and they may exert lawful economic pressure to displace nonunion men with union men.*

Respondents maintain that a proper determination of the question depends upon the determination of whether the respondent unions here have acted **maliciously** and **not in the proper protection of their legitimate interests,** or whether the demands made by the unions in the contract submitted to the appellant **have a proper and direct relationship to its legitimate interests.**

We refer the Court to the case of **Kansas v. Dorchy**, in 71 L. Ed. 248, wherein will be found an elaborate note indicating that the following are proper and legitimate demands, and citations are given in support thereof. Le-

gitimate demands are: Payment of wages during working hours; rates of wages payable by outside contractor; advancement or maintenance of wages; hours of labor; settlement of working conditions; amount of work required; piecework system; enforcement of contract rights; arbitration; mode of enforcing agreements; enforcing negotiations; right to do certain work; retention of obnoxious employee; number of apprentices; amount of help to be employed; reinstatement of employee; closed shop; collective bargaining. Of course, these are not all.

The rationale of these decisions is not a difficult one. The difficulty has always been in the application of the settled law to the facts in the particular case at hand.

The rule has been variously stated, not only in the negative, as was done in the case of **Roraback v. Motion Picture Machine Operators Union**, 140 Minn. 481, 168 N. W. 766, cited in appellant's brief, pages 30, 31, referring to the actions of any individuals or groups, but in the affirmative, as evidenced by the leading case of **National Protective Assn. v. Cummings**, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135. The case arose out of demands made by the union employees for the discharge of nonunion workers. The Court refused an injunction sought by one of the nonunion workers to restrain the union. Justice Gray, in a special concurring opinion, states the rule as follows:

> "Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses, and to make any contract upon the subject he chooses. There is the same freedom to organize in an association with others of his craft, to further their common interests as workingmen, with respect to their wages, to their hours of labor, or to matters affecting their health and safety. They are free to secure the furtherance of their common interest in every way

which is not within the prohibition of some statute, or does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves and to prevent the work which they are fitted to do from being given to others may be keen and may have unhappy results in individual cases, but the law is not concerned with such results when not caused by illegal means or acts."

In 16 R. C. L. 410, at 448, the rule is stated:

"Decisions are practically in harmony in holding that it is within the power of labor unions and it is lawful for them to instruct or order their members not to accept employment with an individual, or to continue in such person's employment where the action of a union is **justifiable in the sense that it is to promote the welfare of the members of the union.** • • • They are left free to enter the employment of the prescribed employer although practically they are compelled to choose between the benefits of such employment and memberships in the unions."

There is cited in the foregoing, **Rhode Bros. v. Musicians Protective Union, Local No. 198**, 37 R. I. 281, 92 Atl. 641, L. R. A. 1915 E 1037 and note, which is a particularly strong case on its facts; since there the employer, having breached a contract with one group of union members, was, by a rigid enforcement of union by-laws, unable to engage any other union musicians even though he so desired, and his inability to do so caused him great damage.

In the case of **Pickett v. Walsh**, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.), one of great prominence in the annals of labor law, dealing with the legality of a strike called by union workers who refused to work where the

pointing of bricks and stones was given to others outside the union, the Court analyzes the problem in this way: That it is not a case where the union is imposing a penalty for failure to employ union members, but a case of where the union members refuse to work if he doesn't, which is perfectly legal. That the employer, as a practical matter, will be forced not to do that which he desires to do "is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful • • •. **But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the legality of them.**"

See also **Nat'l Fireproofing Co. v. Mason Builders Assoc.**, 26 L. R. A. (N. S.) 148, 169 Fed. 259; **Jettson-Wehle Lumber Co. v. Mather**, 53 Fla. 909, 43 So. 591; **Scott-Stafford Opera House Co. v. Minn. Music Assoc.**, 118 Minn. 411, 136 N. W. 1092; **Gray v. Bldg. Trades Council**, 91 Minn. 171, 97 N. W. 663; **Erdman v. Mitchell**, 207 Pa. 79, 63 L. R. A. 534, 56 Atl. 321; **Curan v. Treleavan**, 2 Q. B. 560; **Longshore Printing Co. v. Howell**, 38 Pac. 547, 28 L. R. A. 464.

And as to the validity of by-laws which are directed toward the advancement of the conditions of organized labor, see **Wabash Ry. Co. v. Hanahan**, 121 Fed. 163; **Purvis v. Local No. 500**, 214 Pa. 348, 12 L. R. A. (N. S.) 642, 63 Atl. 585; **Rhode Bros. v. Musicians Protective Union, Local No. 198**, 37 R. I. 281, 92 Atl. 641, L. R. A. 1915 E 1037 and note; **Local Union 313 v. Stothalis**, 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894; **Cohen & Roth Elec. Co. v. Bricklayers Union**, 92 Conn. 161, 101 Atl. 659, 6 A. L. R. 887.

In the case of **Cohen & Roth Elec. Co. v. Bricklayers Union**, supra, the Court, in dealing with an attempted attack on the validity of union by-laws which forbade members from working with nonunion men, said:

"The end the defendants had in view by their by-laws was the strengthening of their unions. That was the legitimate end. There is no indication that the real purpose of the defendant was injury to the plaintiff or the nonunion men it employed. Whatever injury was done plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants begun and prosecuted for their own legitimate interests. The means adopted were lawful. No unlawful compulsion in act and word was present. The plaintiff had its option to employ the defendants or not; trade conditions did not convert this legal option into practical compulsion."

It is for this Court, then, to determine whether the demands made by the union in attempting to unionize appellant's business were made without malice and for the purpose of protecting their own legitimate interests.

The trial court found that the demands made by the unions in their attempt to unionize appellant's business were made without malice, were reasonable and for the purpose of protecting their own legitimate interests (Findings of Fact, 14, 15; Conclusions of Law, 4, 5; R. 110, 111).

We are therefore confronted with the question: Are the rules of the union as embodied in Article III of the proposed contract, and Article XX, Section 6 of the Constitution, rules that are reasonably directed to the legitimate pursuits of the union? (We reserve the argument as to the rule in Article XX, Section 6, for a later portion of this brief.)

The cases heretofore cited, and those cited in the case of **Kansas v. Dorchy**, supra, show that any rules which bear a proximate relationship to the wage scale, the hours of employment, and the encouragement of the exclusive em-

ployment of qualified union members, are for the furtherance of the lawful purposes of the union.

In **Overseas Storage Co. v. Chlopsek**, 209 App. Div. 834, 204 N. Y. Supp. 145, the Court says that

> "• • • the ultimate fact to be determined upon the trial of the case is whether the **primary purpose of the acts complained of is to better the** condition of the **boycotters** as laborers, in which case the boycott would be lawful—or to do irreparable injury to the employer in the conduct of his business, in which case it would not be lawful." (Emphasis ours.)

In **Zoat v. Building Trades Council**, 172 Wash. 445, 20 Pac. (2) 589 (1933), the Court held it lawful for a union to publicize the fact that, as in the case at bar, an employer worked himself in violation of a union rule.

The testimony in the present case, along with the Constitution and preamble to the Constitution, indicate clearly the motives of respondent union in demanding that the appellant here abide by Article III of the proposed contract if he wished to be recognized as operating a union shop. That there was no malice or ulterior motive directed against appellant is evidenced by the fact that approximately seven other contractors signed the same agreement prior to the demand on the appellant, and that in at least six of these union firms there are proprietors or copartners who are skilled journeymen, recognized as such by the union, who abide by the provisions of Article III of the standard union contract.

That the tile laying industry generally in Milwaukee has been depressed, and many union members had to resort to other occupations to earn a livelihood, and many were on relief, is admitted by the appellant (R. 76-77). The testimony of union officials is clear on the following points:

That from 1929, at which time there were approximately 112 union members, the membership has decreased to forty-one in 1936; that union members have been attempting to go into the contracting business; noncraftsmen, of whom the appellant is one, have gone into the contracting business, working at the craft, displacing union men; that as a result it is difficult for the union to maintain its scale of wages and hours for which it has always made a sustained effort for the benefit of its members; that Article III of the contract submitted to appellant, and to other contractors, was a part of this effort to maintain the standard of wages and hours, not only for journeymen, but also for helpers.

Appellant's own testimony, and that of the men associated with him, shows that work was done more than the eight hours a day which the union found necessary for the benefit of its workers; that he performed journeymen's work, although never having served an apprenticeship; that he worked on Sundays also; that he paid a lower wage to those working for him than the union scale provides.

The effect of the contractor working with the tools of the trade when and how he pleases is apparent insofar as the members of the respondent unions are concerned. That there is a direct immediate effect cannot be denied, considering the scarcity of work and the small number of men enrolled in the union.

(3) *There is a broader economic aspect involved in the controversy. A contractor working with the tools of the trade may underbid those who do not do so, and so affect respondents to their detriment.*

There is, however, the broader question, that is, the effect the appellant's method of doing business has upon

the industry. The contractor working with the tools of the trade is not subject to union discipline as he is not eligible for membership in the union. This is a universal rule in the building trades unions, that is, recognition of the distinction between employer and employee. The employer, therefore, working Sundays, all hours he pleases, and figuring his own personal labor at a much lower scale than that paid to the union, is able to underbid the union contractors for whom the respondent employees work. This inevitably leads to the union employer reducing wages, etc., to meet the competition of the employer working with the tools of the trade. Thus the effect of appellant's method of doing business reflects itself to the disadvantage of the respondents. This has been recognized by the United States Supreme Court in **American Steel Foundries v. Tri-City C. T. Council**, 257 U. S. 184, by Chief Justice Taft in the following language:

> "• • • in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood."

And, as is stated by Justice Andrews in **Exchange Bakery & Rest. Co. v. Rifkin**, 157 N. E. 130 (N. Y.):

> "It (union) may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages."

That the provisions of Article III of the contract which prevents the contractor from thus depriving employees of a means of earning their livelihood, is directed primarily for the benefit of the union and not for the purpose of injuring the employer is obvious. That the assertion of

rights by respondents may cause injury to the appellant in his business is admitted. That is, in most cases, the inevitable and unfortunate result of competition in business and among workers themselves. **Martell v. White,** 185 Mass. 255, 69 N. E. 1085, 1087.

In **New Jersey Painting Co. v. Local 26,** 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384, the appellate court, in vacating an injunction granted by the lower court based upon what the lower court maintained was an arbitrary clause in the union constitution requiring contractors going into a different city to pay the highest of the two prevailing wage rates, held that the rule adopted and promulgated by the unions was not aimed at and did not apply to the plaintiff solely; it does not seek to establish arbitrary discrimination between one person or corporation and another.

> "The attack is aimed not at the combination but at its effect upon the employers. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. • • •
>
> "Economically the conclusion reached by the lower court **confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights.** The law gives to the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually, or in combination. They may make rules and regulations passed in good faith, providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action simply because such action may affect some employers. • • •

"• • • The cases in which concerted action on the part of a body of workers have been held unlawful have invariably been such in which either the object sought to be attained had little or no bearing on the interest of the workers or in which the methods employed by them were in themselves unlawful." (Emphasis ours.)

(4) *Unions frequently adopt rules in the interest of employers.*

The adoption of rules for the proper regulation of workers in industry is one of the chief functions of the labor unions and union employers. The rule which gives rise to the issue in this case is that an employer shall not compete with his journeymen employees. It is devised for the protection of employees and it is quite universal in the building trades in that portion of the industry which is unionized.

Let us point out another quite common union rule prevalent in the building trades enforced by the union for the protection of the **employer.** The rule is based on the same principle, only it is devised so that the employees shall not compete with union contractors. There is a prevalent rule in the building trades industry that union employees, even though out of work, cannot accept employment with any one not a union contractor, even though the person seeking to employ them is willing to pay the union scale of wages, have them work the union scale of hours, and in all other respects observe union conditions. For instance, if one had a tile-laying job to perform, he could not make an original agreement with a union journeyman tile layer to do the work on a union basis. If the journeyman did so, he would be violating the rules of the union and subject to expulsion. The reason for it is that the union seeks to

preserve the contractor's status of its union employers. It, therefore, does not permit its journeymen to compete with the union contractor. If one sought union labor he would have to make his agreement with a union contractor, who would furnish the union employees. The union recognizes that the union contractor has an investment in his plant, expends considerable time and effort in endeavoring to secure work for his employees, and he is the one entitled to bid on the job so as to secure it and to allow him sufficient for overhead and his own living.

We recognize that the union employee may decide to violate the union rule and take a job even though in doing so he is competing with union contractors. We do not claim that it is unlawful for the union journeyman to do this. We do claim the right, however, to terminate the journeyman's membership in the union, and to endeavor to replace this worker on the job through a union contractor.

(5) *The rule is necessary to prevent a resort to the subterfuge of partnership, which would bring destruction to the unions and demoralization of industry.*

We have reserved one phase of the discussion relating to the reasonableness of the rule in order to discuss the same in connection with the case of **Hughes v. Kansas City Motion Picture Operators, Local No. 170 et al.**, 221 S. W. 95, cited by appellant. In quoting from the dissenting opinion we do so for the purpose of adopting the discussion relating to the reason for the union rule. We do not cite this dissent from a state court as authority for the principles of law discussed. If the Court should hold in the case at bar that it is illegal for the respondents to request as a condition of unionization that an employer

shall refrain from working with the tools of the trade, then the entire union may face destruction and the craft demoralized. If the rule is applicable to the appellant it must be made applicable to all persons who are employers in the industry. It must be made applicable to the partners of he appellant, and this regardless of numbers. There is no reason why he cannot take in his brother and Holly and anyone else as a partner, give them the status of employers, and thereby enable all of them to bid for contracts on a labor rate considerably less than the union scale. As a matter of fact, the appellant did enter into a partnership with one Wm. Neidner, a union tile setter, who turned in his union card on associating himself with Mr. Senn (R. 70). The reasonableness of the rule, therefore, in respect to a small craft, constituted as this craft is, is pointed out by the dissenting opinion in the **Hughes** case. In the recital of facts in the majority opinion it is stated:

> "• • • The testimony shows that there was a rigid rule of the union that no proprietor of a moving picture show should operate his own projecting machine, and that in every case a member of the union must be employed. The reason assigned by defendants for this rule is that experience had shown persons would claim to be interested as a partner in the business and to have the right to operate as such when, in fact, the claim was a subterfuge, used as a means to obtain a position as operator without becoming a member of the union and at a wage less than the union scale; that if such a rule was not enforced, proprietors of theaters, even though members of the union themselves, would be able to employ nonunion operators at a lower wage, under the guise of taking them in as partners. There was testimony, too, in behalf of defendants about the proprietors of other thea-

ters, who employed union operators and otherwise complied with the rules of the union, having complained on occasions when some proprietor was permitted to handle his own machine. • • •"

But the majority of the Court went on to say that picketing and boycotting were

"• • • for so trivial a cause. Most of the decisions were in cases of lockouts, black lists and strikes directly connected with the struggle of workingmen to better their lot, and involving large issues of general social welfare. • • •"

It is apparent that the majority of the Court was passing upon the degree of economic interest the union had in adopting the rule. We quote quite extensively from the minority opinion since it is a complete analysis of the reasons for the union rule:

"As the majority opinion states:

" '**The object of the union and its rules was to improve the condition of the members and of the laboring classes in general by increasing wages and elevating the scale of living.**' This object is to be kept in mind throughout the case. One thing the union sought was the employment of operators at a living wage. The pertinence of this as a legitimate aim toward a thing essential to the accomplishment of the purpose of the organization is apparent. The facts mentioned as arousing the interest of the union indicated clearly that there had sprung up a growing practice among exhibitors to associate with themselves nonunion operators under the name of 'partners' or with the representation that they had 'an interest,' for the purpose and with the effect of avoiding employing union operators. • • • He admitted he knew the reason the union operators objected to 'employers or owners operating their own machines was that there was

great danger of the employers breaking down the standard scale and living scale of wages as existed the country over, and thereby regulating as they saw fit the hours and conditions of labor.' • • • The reason for the rule was that if the union recognized as 'fair' the operation of their own machines by exhibitors (owners) these could, as had been done and was being done, by the simple device of dubbing a nonunion operator a 'partner' or representing that he had 'an interest' in the show, easily conduct nonunion places in competition with shows complying with union rules and 'fair' to organized labor, and thus secure the benefits of the patronage of organized labor, its friends and sympathizers, while, in fact, by this evasive method, discriminating against it. **The view of the union was that it could not endure if a practice was countenanced which in theory would afford, and in fact had afforded, and was affording, so convenient and effective a cover under which exhibitors could secure, had secured, and were securing, all the benefits of unionism and its patronage without conforming to its reasonable standards or accepting any of its incidental burdens.** • • •

"Hughes' offer, even had he made one, to join the union if they would modify their rules amounts to nothing. If he desired to join he might do so if the union would accept him. **There is nothing to indicate he had any legal right to impose membership conditions upon the union. Such offer could not affect the question here. That depends upon the identical things upon which it would have depended had he made no such offer.**"

• • • • • • • •

"I. The majority opinion seems to place the reversal of the judgment on the ground that the record shows a number of things which, in combination, constituted a nuisance. It states that (1) the union demands were arbitrary and unlawful; (2) the union was

attempting to deprive Hughes of the right to 'make a living by the work of his hands'; (3) there was intimidation of patrons; (4) that the statements made by the pickets that the theater was 'unfair to organized labor' were false statements; (5) that the rule and the picketing had no substantial relation to the promotion of the welfare of union men; (6) that some of the attendants of the theater were 'forced into unpleasant activity to preserve their patronage'; (7) that the patronage was diminished; (8) that these things show the theater was so 'beset' that a nuisance was created, and could be and should be enjoined.

• • • • • • •

"• • • To what extent will the courts decide what rules union labor organizations may adopt and follow on this question of fairness and unfairness? According to the Supreme Court of California, the justice or policy of union rules, adopted in good faith, are matter outside the province of the courts, 'and, with regard to other questions of economic or political aspect, the remedy, if remedy is needed, must be found by the Legislature.' Parkinson v. Building Trades Council of Santa Clara County, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Am. St. Rep. 1165.

"It is unnecessary to attempt in this case the formulation of the rule on this subject. There can be no question that the rule that an exhibitor who operated his own machine would be deemed unfair originated out of a real condition which threatened the welfare of respondents. Hughes admitted he knew this. **The evidence is clear that the rule was not adopted in a spirit of malice or frivolity or otherwise than as the result of a well-founded conviction that it was necessary for the preservation of respondent local and furtherance of its lawful purposes.** That the practice at which it was aimed was one of deceit and unfairness, objectionable to honest exhibitors as well as to the union, is also shown by the evidence. That the rule

had a real relation to defeating this underhand practice, and thereby preventing the disruption of the union seems apparent to the writer. In addition, it seems reasonable that the principle of the majority opinion now being discussed logically expends its force upon the question of malice. It is relevant to that inquiry when that inquiry is relevant to the issues. **The rule referred to was not a reasonless one, was adopted in good faith, had a substantial relation to the advancement of the legitimate purposes of organized labor, was not unlawful in itself, and its violation would have justified the statement that the violator was 'unfair.'**

* * * * * * *

"(4) If the picketing was otherwise lawful, the fact that appellants were forced into unpleasant activity to preserve a patronage to which they were not entitled, and which they had attempted to retain by deceit, or at any rate despite their unfairness to organized labor, is not an objection to the judgment of the trial court. If so, there is always, in every case, no matter what may be the justice of organized labor's grievance, at the disposal of every man who desires to use it, an effective method of putting injunctive processes in motion." (Emphasis ours.)

(6) *Appellant assumes that respondents are actuated by "malice," although all evidence is to the contrary, and the Court so found. Respondents' act of peaceful picketing is a lawful form of appeal to the public not to patronize appellant. The public is free to accept or reject the appeal and the appellant is free to perform all the work he can get and in whatever manner he wishes to perform it.*

Appellant fails to comprehend that the respondent labor unions and their members are not preventing the appellant

from exercising his right to work with the tools of his trade. They are exercising their own right to solicit the public not to patronize and give work to the appellant, and they are soliciting and appealing to employees not to work for the appellant. If the public, or any portion of it, is not inclined to heed the appeal and gives him work, which it has the right to do, the appellant is not prevented or hindered from performing it, and he can do so personally and with the tools of the trade. If his workers are not inclined to heed the appeal of the respondents not to work for the appellant, as they have the right to do, such workers may work for the appellant and he is not prevented or hindered from employing them. **Picketing is a means of informing the public of a labor dispute and a form of solicitation of both public and employees not to patronize the person picketed and not to take employment with him. The decision to heed such solicitation and appeal is a matter resting entirely with the public and with his workers.**

So as to clarify the issue we should like, by way of analogy, to demonstrate how untenable the position of appellant is when considered in the light of recognized industrial law.

In so far as nonunion employees are concerned, the same argument made by appellant regarding the sanctity of the right to use one's labor and to be protected in that use has been made. It is on the basis of such contentions that the great body of our labor law has grown. And out of these disputes has grown the following incontrovertible principles: organized labor may use legitimate means of persuasion to prevent the employment of nonunion men; organized labor may strike and boycott to force the recognition and adoption of the closed shop; organized labor may refuse to work with nonunion employees and by their refusal force the employer to discharge such employees; and

organized labor can go so far as to refuse to work with men whose habits, conduct and character are obnoxious to them. All these are rights fully recognized by the law of the land. That as a result of such demands others may lose their jobs and means of livelihood is not controlling, since the basic issue is the exercise of a right directed toward a legitimate end—the betterment of their conditions as a body.

Now, if one's nonunion affiliation, or habits, conduct and character constitute a justification for a combination of his fellow workmen to refuse to work with him in consequence of which their employer dispenses with his services, how can the employer object, when to further the same interests, organized labor uses the same means to prevent the employer from working with them? He still is free to do as he pleases in the case of an employee—employee conflict,—discharge the men against whom the union's efforts are directed, or continue to employ them and disregard the union's demands. In his own case he can continue to work, or, in the alternative, he might elect not to work rather than subject himself to the legitimate economic persuasion of organized labor. His rights are no greater or less than those of his employees. Nor are they greater or less than those of organized labor. Each is asserting an allowable and recognized right. As long as the means employed to secure that right are legal means, the conflict is one which falls properly in the field of socio-economics and the courts of law have no interest other than to see that neither party resorts to illegal means or violence.

The Court of Appeals of New York, in the case of **Stillwell Theater v. Kaplan**, 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6, stated the proposition fairly when it said:

"The court of appeals has for many years been dis-

posed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve him from damages threatened by recourse to unlawful means, but the right of workmen to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts. **The interests of capital and labor are at times inimical, and the courts may not decide controversies between the parties as long as neither resorts to violence, deceit or misrepresentation to bring about desired results.**" (Emphasis ours.)

Justice Fairchild, in the case at bar, points this out very clearly, saying:

"The respondents' act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up. As stated by respondents' counsel in their brief, 'the public is free to accept or reject the appeal and plaintiff is free to perform all work he can get in whatever manner he wishes to perform it.' He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code. Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, injuria absque damno."

(7) *Discussion of leading cases cited by appellant as to reasonableness of article III of proposed agreement.*

We submit that a close examination of the state cases cited by appellant indicates that they are not in keeping with what the trial court termed "the more recent trend of cases."

Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N. W. 766 (1918), strongly relied upon by appellant, is the first case dealing with a like problem. In that case an injunction was sought to prevent the picketing of plaintiff's theater where plaintiff, the owner of the theater, operated his own picture machine contrary to the rule of the union. The decision dealing with the law starts out with the statement:

> "No person or combination of persons has the right **maliciously** to injure or destroy the business of another, **by acts which serve no legitimate purpose of his own.**" (Emphasis ours.)

This principle is too well established in law to permit of any argument. And likewise, when the Court goes on to say, "One man singly, or any number of men jointly, **having no legitimate interests to protect,** may not lawfully ruin the business of another by **maliciously** inducing his patrons and third parties not to deal with him," the Court in enunciating that principle states the law applicable to the case at bar. But, as we will hereafter show, the Court disregards the necessary elements of "legitimate interests" and "malice" and applies the rule as though these elements are established. The cases cited by the Court in support of the foregoing correct principle of law are pertinent in so far as "protection of legitimate interests" or conduct purely "malicious" are concerned. Let us examine them briefly:

In **Tuttle v. Buck**, 107 Minn. 145, 119 N. W. 946, the Court dealt with a situation in which a barber, to satisfy a personal grudge, opened up a competitive barber shop with the purpose of ruining the plaintiff's business as a barber. The Court held such conduct unjustifiable because it served the barber **no legitimate purpose of his own.** Even so this case is sharply criticized on the basis of free competition. See 22 L. R. A. (N. S.) 599, note.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260, cited in the **Roraback** case, supra, is one which has been constantly weakened by subsequent decisions (**Amer. Steel Foundries v. Tri-City C. T. Council,** 257 U. S. 184). Nevertheless, the majority decision which is still freely quoted emphasizes interference which is **malicious.**

Ertz v. Produce Exchange, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, also stresses the illegality of interference with another's business where the interferers have **no legitimate interests to protect.**

Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, in which the Court held that there was no legal justification for the defendant, a representative of a national union of shoe workers, to obtain the discharge of the plaintiff, a nonunion employee, under the provisions of a contract entered into by the union and an employer calling for a closed union shop. The closed-shop contract was recognized by many courts prior to the Code; it is valid under the Code, as held in **American Furniture Co. v. I. B. of T. C. & H. of A. et al.**, 268 N. W. 250.

So the case is no authority for the proposition.

We should also like to call attention to the fact that the case of **Jacobs v. Cohen**, 99 App. Div. 481, 90 N. Y.

Supp. 854, cited in the **Berry** case, supra, in support of the Court's decision, was reversed by the Court of Appeals in New York, 76 N. E. 5, 2 L. R. A. (N. S.) 292, in which case it was held that a contract to employ union labor only is not void as against public policy.

Willner v. Silberman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895, in which the Court held that the circulation of a so-called "black list" by an employer, not stating fairly the reasons for the discharge of the complainant employee, was actionable. The case contributes nothing to the solution of the problem which the Minnesota court was trying to reach, except to illustrate what is unjustifiable interference.

Gray v. Building Trade Council, 91 Minn. 171, 97 N. W. 663, 1118, 63 L. R. A. 753, which merely declares a boycott illegal, and which no longer is, under the Wisconsin Code.

Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165, in which the Court was concerned with the union's arbitrary discharge, discipline and punishment of one of its members, with his resultant loss of position in a closed union plant, and held that the plaintiff was not given the fair trial to which he was entitled. The Court says that a man has the right to be free from hindrance in his work, except as may result from the exercise of **equal or superior rights**, including **fair competition**. Also, "**rights, like all other rights in a state or society, are qualified to a considerable extent when they come into conflict with the rights of others.**" (Emphasis ours). That is precisely respondents' contention here.

Hundley v. Louisville & N. R. Co., 105 Ky. 162, 48 S. W. 29, 63 L. R. A. 289, in which the Court again was concerned only with a **malicious** blacklist.

Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, in which the Court declared a strike illegal because there was not peaceful persuasion. But affirmed the right of trade unions to cease work for reasons satisfactory to their members.

De Minico v. Craig, 207 Mass. 593, 94 N. E. 317, in which the Court held that personal objections to a coemployee were not asserted in good faith or for a legal purpose. There are many later authorities contra, but regardless, the case is not in point with the proposition that the Minnesota court is trying to prove.

Perhaps we have gone far enough in analyzing the **Roraback** case. There can be only one conclusion. That the Court very correctly enunciated the rule of law when it stated that "no person or combination of persons has the right **maliciously** to injure or destroy the business of another, by acts which **serve no legitimate purpose of his own**," but went far afield in attempting to get the facts of their case to fit in with that proposition. It made no attempt to ascertain whether the acts were "malicious" or not, or whether the union was serving a legitimate purpose of its own. No reference is made to that phase of the case, and the Court blandly proceeds to assume what it was under compulsion to prove by its own rules governing such situation.

We also should like to refer the Court to that part of the majority opinion in the **Roraback** case which reads:

> "The case is presented upon the pleadings and upon affidavits pro and con; it has not yet been tried. **If, when the case is tried and findings are made determining the facts, it shall appear that plaintiff's contention is correct,** he is entitled to relief, **but we can-**

not say that the trial court abused its discretion in refusing to issue an injunction before the facts are ascertained; and the order appealed from is affirmed." (Emphasis ours.)

The "contention" referred to is the argument made that "the purpose of the defendants is to injure and perhaps destroy plaintiff's business unless he accedes to their demands." If that was the **sole** purpose of the defendants in that case we accept the case as controlling here, if the Court had found that was also the purpose here. But if, on the determination of the facts in the **Roraback** case, it were found that the purpose was not to injure and destroy plaintiff's business, but for the legitimate end of furthering their own legal interest, and the injury complained of was only incidental (and that is the respondent's position in the present case), then it is clear that plaintiff's contention was not correct and he would not be entitled to relief in that case.

However, we direct the Court's attention to the concurring opinion of Justice Hallam, which clearly and succinctly states the proposition contended for by the defendants, and which was adopted by the trial court in the instant case:

> "I do not understand that the right of a man to work in his own business is questioned, nor do I understand there is any claim of right of defendants to destroy plaintiff's business on any ground.
>
> "I understand that the defendants have the right to refuse to work as fellow workmen with nonunion men or **with an employer**, and that they have the right in a proper and orderly manner to advise one another, or the public, **that a certain employer does not employ union operatives, or that he insists on operating his own machines. It seems to me that the**

main question is whether the conduct of defendants has amounted to more than that. If not, their acts have not been unlawful." (Emphasis ours.)

This statement clearly establishes the proper approach to the problem. It is the position which the respondent here takes, and is a reiteration of respondent's claim that appellant has the right to refuse to unionize and has the right to work in his business with the tools of the trade. But respondents are asserting their own rights, secured to them by the common law and the Wisconsin Labor Code; and in the assertion of those rights are using legal means at their disposal.

The position of the defendants throughout this case has been in conformance with the rule of Justice Hallam in the **Roraback** case. In the transcript of the record, page 67, appears a colloquy between the Court and respondent's counsel. During the colloquy counsel stated:

> "It is not a question of whether we permit him to work. He can work all he pleases, or operate a non-union shop. He has a right to operate a nonunion shop. I want to make that as clear and emphatic as I can. It is his legal and definite privilege to operate a nonunion shop. That is his legal and absolute right to pay ten cents an hour if he can get them. But it is our right again, the union right, to endeavor to secure from him a union contract, or have him run a union shop. And he can refuse to do it, but we will bring economic pressure to make him do it."

In 3 **A. L. R.** 1295 appears a note in connection with the **Roraback** case. We quote from it:

> "Although the conclusion reached in the reported case commends itself as a proper one, some of the

language used therein, so far as it conveys the impression that any attempt to deprive a person of the right to work in his own business is necessarily unlawful, would seem to require qualification. If one's habits or conduct or character may constitute a justification for a combination of his fellow workmen to refuse to work with him, in consequence of which their employer dispenses with his services (citing cases), it would seem that one's employees might, on like grounds, lawfully combine to refuse to continue in his employment, although, when confronted with the alternative, he might elect not to work, rather than to part with his employees. **So, also, it would seem that in order to procure the work for themselves, one's employees might lawfully give their employer the option of relinquishing the work done by him, or or doing without their services** (citing cases)." (Emphasis ours.)

In the case of **Finke v. Schwartz**, 20 Ohio (N. P.) 407, the Court was confronted with precisely the same situation as in the case of **Roraback v. Motion Picture Operators**, supra. The Court considered the Roraback case, but adopted the special concurring opinion of that case, set out at page 44 of this brief, and denied the application for injunction.

In the case of **Hughes v. Kansas City Motion Picture Operators**, 282 Mo. 304, 221 S. W. 95 (1920), cited by appellant, the Supreme Court of Missouri held that a demand made by a union that the proprietor of a theater do not operate the picture machines used in the theater is arbitrary and unreasonable. Here again we have the unfortunate situation of an appellate court speaking about absolute property rights in one breath, and qualified rights in another breath, without making any attempt to recon-

cile the two. Abstract propositions of law are flung about in abundance, unanchored by fact, reason or reliable authority to the specific case before the Court.

It isn't until we reach the dissenting opinion, written by Justice Blair, and concurred in by Justice Williams and Chief Justice Walker (already discussed at pages 33-36 of this brief) do we find any discussion of the specific problem, i. e., is such demand a reasonably just one, advanced in good faith for the legal purpose of improving the conditions of the members and of the laboring classes in general by increasing wages and elevating the scale of living? This dissent disposes of the problem in the only logical way that it can be done—by taking into consideration the objects, purposes and reasons for the union demand, analyzing the facts closely, and then placing its decision on the result of such analysis. Even so, the dissent calls into question the Court's power to decide at all on such issues, particularly where the dispute is close, by calling attention to the decision by the Supreme Court of California in **Parkinson v. Bldg. Trades Council**, 154 Cal. 581, 90 Pac. 1027, 21 L. R. A. (N. S.) 550, in which case the Court said that the justice or policy of union rules, adopted in good faith, are matters outside the province of the Court, "and with regard to the questions of economic or political aspect, the remedy, if remedy is needed, must be found by the Legislature."

Appellant also cites the case of **Parker Paint and Wall Paper Co. v. Local Union No. 813**, 87 Va. 631, 105 S. E. 911, 16 A. L. R. 222. In that case the plaintiff was granted an injunction because the defendant union had resorted to an illegal secondary boycott. And while the Court makes the statement that members of labor organizations cannot object to an employer laboring with his hands in perform-

ing his own contracts, it makes that statement as obiter dictum, not being called upon to decide the issue. Since no attempt is made to fit the case into the accepted rule by examining the facts, we submit that it should not be considered authority in the case at bar.

(8) *If appellant's right to the free use of his hands is illegally invaded by article III of the proposed agreement, then it is equally invaded by a provision in an agreement that he work only eight hours per day; and that he refrain from working on Sundays, because these, too, are restrictions on his right to the free use of his hands. Such contention demonstrates its own fallacy.*

Appellant repeatedly emphasizes the contention that appellant is being denied the right to the free use of his hands and against his will. As we have pointed out, we do not deny that appellant has the right to the use of his hands. We are merely asserting the respondents' own rights in the competitive struggle to have more use of their own. If in such competitive struggle, and by the use of lawful means, appellant should find that he has a dearth of work upon which to exercise the free use of his hands, it is an incident of a lawful economic struggle for which the law affords no redress to either side. However, the claimed right to the free use of one's hands is subject to qualification. There are lawful impediments, restrictions, and regulations to, and even denials of, the free use of one's hands.

A workman has not the absolute right to the free use of his hands, so that the Legislature cannot deprive him of the same. The rule must be read in its qualified sense, for certainly the Legislature may prescribe that one may not work in a trade unless he has undertaken a course of

learning and apprenticeship to acquire requisite skill to perform the work he desires to perform. Thus by our own laws no person can do or perform all manner of plumbing work unless he qualifies as prescribed by Chapter 145 of the Wisconsin Statutes. A board is set up to conduct examinations as to qualifications of the persons desiring to work at the trade. An apprenticeship must be served for a period of five years before he can qualify "as a skilled mechanic in the art of installing plumbing work." A mere possession of practical knowledge will not suffice. The person must comply with the prescribed legal requirements. Here we have an illustration of a rule as rigid as that required of persons desiring to enter the professions.

The isolated expression that every man has the right to the free use of his hands must be considered in the light of the business he is engaged in or wishes to engage in. As an abstract proposition it sounds well, but it is not the law. One may own a business and yet not be permitted the free use of his hands in performing practical work in the business. A man may own a barber shop and yet may not be permitted to work as a barber. A man may own a pharmacy, and yet may not be permitted to fill prescriptions. One may own a beauty parlor and yet may not perform the practical work of the beauty operator.

Ownership of business does not necessarily carry with it the right to work with the tools of the trade.

It may be argued that in the illustrations given the law steps in, under the police powers of the state. But it establishes that there is no absolute right to work at whatever one chooses as his employment. It establishes that the extravagant statement that a "workman has the right to the free use of his hands, a right which the Legislature cannot deprive him" is mere oratory when asserted as an unqualified rule of law.

Appellant contends in his brief (pp. 47, 48) that the demand that a man "cease to work with his own hands in his own lawful business is so shocking and so intolerable that the natural inference of the human mind would be that under constitutional government" a statute legalizing picketing would be impossible. We do not know why an economic organization suffering from the unfair business methods of another should not be permitted by lawful economic persuasion to do that which, in principle, the legislatures of all states do at every session, that is, regulate or prevent competition that is destructive of fair standards in the industry. In order not to destroy an industry the legislature requires persons seeking to work in and conduct certain businesses to secure certificates of convenience and necessity before having the right to go into business. These certificates of convenience and necessity are frequently refused if there is adequate service and if granting another will destroy those already in it.

It is urged that this is a denial of a man's right to perform the work he chooses to do, but the union here does not deny Senn's right to work; it seeks to divert as much of the work in the industry as it can divert to itself; if successful, Senn will cease to be a destroyer of the welfare of the trade. But aside from that, is it any more illogical for an economic organization seeking to preserve, maintain and improve working standards, to ask the unionized employer not to work in competition with his employees than to demand of him that she shall not work in excess of eight hours a day, that he shall not work on Sunday? If he is free to work in the business, should he not be just as free to work in it as he sees fit, there being no statutory inhibitions? Carrying the argument further, why should a union have the right to say to one who is

free to work with his hands in competition with his employees that he shall not work longer than eight hours a day if he cannot live unless he works twelve hours a day? Why should it say to him that he shall not pay his employees less than $1.25 an hour, if he cannot live by paying more than 65 cents an hour; each demand, backed up by economic persuasion, which may prove effective and thus put him out of business is just as much an interference with his right to work as is the demand that he shall not compete with his employees by working at the trade; and yet the demands that he conform to a wage scale and to certain hours are valid, though producing the same effect.

We argued the foregoing to show the absurdity of the contention made, although the true answer is that he can work long hours; he can refuse to unionize his shop; he can employ others at 65 cents an hour; but if in doing so he inflicts an injury upon another, that other at least has the right under the law to compete with him and make his methods known, even if it inflicts injury upon him.

As Mr. Justice Fairchild says:

> "• • • it is apparent that under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable because it tends to promote the welfare of the members of the union engaged in the same craft."

Of course, counsel argues, as does the appellant in the **American Furniture Company** case, that the controversy must be between the employer and his employees, but our court points out that the plain unambiguous provisions of the code extends the **Clayton Act** and the narrow construc-

tion given it in the **Duplex** case to bring within the classification of disputants "an association of employees" "regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Justice Wickhem in the **American Furniture Company** case says:

> "Thus, it coming to the attention of a union that a particular employer (1) is paying extremely low wages to workers in the craft it represents, or (2), is insisting upon unduly long hours of labor, or (3), is refusing to hire union labor or to permit members of a union to work for him, it could make demands for changes and, upon refusal of these demands, be considered a party to a labor dispute and entitled to the exemptions of the act."

(9) *The burden of proving that the union demand is unreasonable is on the appellant.*

And, before leaving this aspect of the case, respondents respectfully point out to this Court that the appellant has failed to carry the burden imposed upon him by law, i. e., of proving the unjustifiability of the union's demands. As was said in **Barker Painting Co. v. Brotherhood of Painters**, 15 F. (2) 16 (1926):

> "Insistently urging the rules in question and the manner of their enforcement by the union are unjustly discriminatory against the complainant and all other employers similarly situated and operate to the injury of the public • • •, the complainant further urges that the rules are not for any justifiable or indeed for any visible benefit to the laborers themselves except that thereby they may arbitrarily obtain higher wages in given circumstances, and that no ground or reason has even been intimated by the

union or its counsel for justifying them. **In this proceeding the burden of justifying the rules does not rest on the respondents; it is the complainant who pressed for a preliminary injunction before the answer was filed to establish that the rules are unlawful by evidence sufficient to invoke that extraordinary remedy."** (Emphasis ours.)

B.

The Provision of the Union Constitution That No Member May Work With an Employer Who Works With the Tools of Their Trade and Who Is Not a Qualified Craftsman, as Defined in the Union Rules, Would Bar the Appellant From Working With the Tools of the Trade, as a Union Contractor, Even if Article III of the Proposed Agreement Were Dropped Out. This Provision of the Union Constitution Is a Reasonable One. The Apprenticeship Rules of the Union Are Reasonable.

In the accompanying brief on jurisdiction we pointed out that by virtue of rules relating to apprenticeship, and prohibitions against union men working with an unskilled craftsman (which the appellant in this case is), the union could only unionize him on the basis that he refrain from working with the tools of the trade. We now contend that if the Court is of the opinion that article III of the proposed agreement, to which the appellant objects, is an unreasonable provision and that by virtue thereof respondents have no dispute with appellant, there is, nevertheless, the dispute arising from article XX, section 6, which prohibits union men from accepting employment with a contractor who is not a practical tile setter and who insists on working in competition with them with the tools of the

trade. We direct the Court's attention to the findings of fact made by the trial court that appellant was not a practical tile setter within the rules prescribed by the union (R. 28, Finding 16). These findings were affirmed by the Supreme Court of the State of Wisconsin. It is respondents' contention that the rule here discussed is reasonable, and having been so found by the Court the judgment in the case rests upon an issue of fact, and that regardless of any other questions raised, respecting other demands and the reasonableness of them, there is no longer any constitutional question in the case.

We come now to discuss Article XX, Section 6 of the International Constitution, which reads as follows:

> "Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical bricklayer, stone mason, cement mason, plasterer, marble mason, tile-setter, mosaic or terrazzo worker.
>
> "This section shall be inserted in all subordinate unions' by-laws."

This same rule is contained in respondents' local by-laws section 30:

> "Members shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical tile-setter."

(We shall refer to this rule as article XX, section 6.)

While this rule is a prohibitory one as to union members, its effect is the same as article III of the agreement on the nonjourneyman employer. Such employer, not being a practical craftsman, cannot have a union status if he persists in working with tools of the trade. Article XX, section 6, applies to all the crafts affiliated with the In-

ternational Union. It was in force for many years prior to the dispute with appellant, and was in force at the time of it. It has never been repealed. Although article III of the proposed agreement accomplishes the same result as article XX, section 6, article XX, section 6, does not accomplish the same result as article III of the agreement. Article III does not displace article XX, section 6, although in covering a wider field it does what article XX, section 6, does.

Therefore, if for any reason article III of the agreement is invalid, we are still confronted with the problem of the validity of the rule in article XX, section 6.

Although appellant lays stress on article III of the agreement, article XX, section 6 of the constitution is equally important, for it presents another reason for the refusal of the union to place Senn in the category of a union contractor. Appellant's willingness to sign a union contract on condition that he be permitted to work with the tools of the trade is violative of that provision of the constitution which prohibits union employees working with a contractor who is not a practical tile setter.

Respondents contend that appellant was not asked, as a condition of unionizing, to lay down the tools of **his** trade. He was asked to lay down the tools of **their** trade (R. 83-84). They contend he was not a practical tile layer and they could not work with him under the rules of their constitution. The union has certain standards by which it determines who is a skilled craftsman. It requires that a person shall serve an apprenticeship of three years and take some special educational course in the craft. This is by no means an unreasonable requirement. At least the appellant has not proven it to be unreasonable. In fact, there must be something to skilled craftsmanship, since the appellant insisted that if he operated a union shop he

wouldn't take anyone the union supplied him, but he would insist upon a competent mechanic.

"Q. Are you willing to take any member of the union to work for you? That is up to the union who shall work for you?

A. I wouldn't go that far. The man that the union gives me would have to be a competent mechanic" (R. 58).

It is generally known that in those skilled crafts allied with the building trades a minimum of three years apprenticeship is required before one is classified as a journman entitled to do tile setting.

Article XVI of the International Constitution provides:

"Sec. 3. **All apprentices should attend a technical night school for one year during their term of apprenticeship or take up a home-study course which shall have been approved by the Executive Board.**

"Sec. 4. No subordinate union shall be allowed to indenture apprentices to journeymen, but only to recognized union contractors of their jurisdiction.

"Sec. 5. Should any employer or firm suspend or give up business, it shall be the duty of the subordinate union to aid as far as possible any apprentices that may be thrown out of employment and desire to finish their time, and at the expiration of their apprenticeship they shall, if found competent, be entitled to journeymen's wages upon joining a union. No subordinate union shall be allowed to indenture any apprentice to firms, corporations or manufacturers inside of the jurisdiction of any other subordinate union.

"Sec. 6. Any apprentice leaving his employer before his time of apprenticeship expires without a written discharge from his employer, stating cause, etc.,

or in the event of the death of his employer, or as before provided in Section 2 of this Article, shall not be countenanced by any subordinate union working under the jurisdiction of the International Union, nor shall the members of this I. U. work with such apprentices until the provisions of the preceding section have been complied with.

"Each and every apprentice binding himself to serve a stated term shall be required to fill his contract with his employer or leave the business entirely.

"Any member of the I. U. who knowingly vouches for the initiation of a runaway apprentice in any subordinate union shall be fined $10.00.

"Sec. 7. **All regularly assigned apprentices shall be required to serve not less than three years.** Subordinate unions will not be allowed to issue permits to any apprentice known as 'roving permits'; this part not to relate to apprentices of bona fide contractors of a city who may from time to time take contracts outside of the jurisdiction of the subordinate union in which the apprentices are enrolled.

"Sec. 8. The International Union recommends that each subordinate union make such terms or stipulations in the filling out of indenture papers as they in their judgment may deem best. **But no contract for indenture shall be made for a term of less than three years.**"

It is admitted and established that the appellant has never served a three-year apprenticeship (R. 68):

"Mr. Engelhard: We will stipulate that he (Senn) has never had the apprenticeship as prescribed by the union. We will stipulate that the three-year apprenticeship, which the union requires of apprentices, has not been had by Mr. Senn.

The Court: That is all Mr. Padway is seeking to show.

Mr. Padway: Will you stipulate, too, that the requirements of the union in connection with the attendance at a technical high school during that apprenticeship, or taking up a home study course, which is approved, has not been complied with?

Mr. Engelhard: We will stipulate that as a tile layer he has never gone to night school.

Mr. Padway: He has never gone to a night school or studied anything in connection with tile laying?

Mr. Engelhard: That subject is now covered."

He worked as a laborer and he claims as a tile setter for a period of eight or ten months in Florida. The fact that he has continued to work in the trade or craft since 1931 without serving his apprenticeship does not entitle him to be classified as a skilled craftsman because he has not complied with the rules determining that he is a skilled craftsman. This rule from a union point of view is as reasonable and as sound as the rules of those states requiring one preparing for the bar to take pre-legal training, and three years of law before being admitted to practice his profession. The fact that one may sit in a law office and acquire a practical knowledge of the law is not, in those states, a permit to practice law. What professions claim for themselves, unions should not be denied to claim for their craft. In fact, the unions believe that as much skill enters into a machinist's work, into setting up structural iron, into performing cabinet carpentry, into setting tile, as in practicing medicine, law, dentistry, etc. These rules are specially devised to prevent an individual from working in the trade for a short period of time, then holding himself out to the world as a skilled craftsman. The rule is designed to prevent the very situation disclosed by the case at bar, that is, eight or ten months as a laborer and tile setter, then under the status of "contrac-

tor," working with the tools of the trade, thus displacing workers who have given years to an apprenticeship in order to acquire the classification of skilled journeymen craftsmen. Craftsmen are rightfully jealous of their right to use the tools of their craft. This is emphasized in the following question and answer of Mr. Schreiber:

> "Q. I know that. Let's get that clearly. It covers the laying down of his tools.
>
> A. They are not **his** tools. That is the argument" (R. 83).

Can it be held that this union rule is unreasonable? Yet that is one of the reasons assigned by Mr. Schreiber why the union could not unionize the appellant if he insisted on working with the tools of the trade. We direct the Court's attention to Mr. Schreiber's testimony (R. 34) to the effect that Senn was not, according to union rules, entitled to work as a journeyman craftsman.

It is an inviolate union rule that a helper shall not do a journeyman's work. This rule is so firmly entrenched in union labor relationships that no employer questions the reasonableness of it, yet here is a man who assumes the status of contractor and works as a journeyman in the trade, which he would not be permitted to do if he were a union helper. If union helpers are obliged to accept this rule, should union journeymen be obliged to see it invaded by a person not a journeyman just because he goes into the contracting business? Is the union obliged to give greater protection to a nonjourneyman contractor than it gives to a nonjourneyman union employee? That would be the effect of granting a union contract to the appellant on his terms. It would permit every helper to obtain the status of a journeyman or at least do journeymen's work by announcing that he is a contractor. If there is any-

thing that would be suicidal to the industry insofar as the union journeyman worker is concerned, it would be that policy.

For the appellant, in this case, to perform journeyman's work is as detrimental to the union's interests as for appellant to employ helpers as journeymen. If he did so, and the union requested him to unionize his shop and thus obviate the employment of helpers as journeymen, and he refused, would not that constitute a labor dispute? Yet, if appellant's contention is correct he should be permitted to say: "You have no dispute with me since I am willing to sign a union contract except for the one provision that helpers cannot do the work of journeymen. The pay of helpers is less than the pay of journeymen. By the arrangement for utilizing helpers as journeymen, I can continue in business. By employing only journeymen in journeymen's work, I cannot continue in business." Thus the appellant would be permitted to determine the reasonableness of a union rule upon his standards based upon his ability to continue in business.

If the Court accepts appellant's contention, then it must hold that the rule of the union that an employer cannot be unionized if he is not a skilled craftsman, and insists upon working with the tools of the trade, is unreasonable. The Court must hold that the distinction between "journeymen" and "helpers" is an unreasonable one. The Court must hold that the union distinction between "contractor" and "employee" is unreasonable.

Article XX, Section 4, of the International Constitution, under the heading, "Powers reserved to subordinate unions," provides:

> "It shall define the distinction between contractors and journeymen, and state those who are eligible to membership."

Unions recognize the distinction between employer and employee. It is universal that unions will not take into their membership an employer. One reason is it cannot regulate the wages of the employer. It therefore says to him: "Your business is that of contractor. You confine your activities to that work. Ours is that of craftsman."

The following letter of the secretary of the union to its international is significant (R. 78, 79):

"Secretary J. J. Gleeson

Milwaukee, August 23rd, 35.

Dear Sir and Brother:—

In answer to your letter of the 19th inst., wish to state that Sec. 6 of Article 20 of the I. U. Constitution covers Mr. Senn's complaint.

He was a plastering contractor, a nonunion one at that, before entering the tile business.

He has consistently hired nonunion tile setters and acted as helper and slowly broke into the game, and we feel that he either be a tile contractor or go back to plastering.

Fraternally yours,

Charles Schreiber, Secretary."

Appellant was informed he was not a bona fide journeyman.

"Shortly after I wrote the letter to Mr. Gleeson, Mr. Schreiber stopped in on one of my jobs and we started talking about this. He inferred—he said he didn't think there would ever be a chance of my using the tools. I says, 'Why?' 'In the eyes of the union you are not a bona fide journeyman tile setter.' I says, 'Charley, how long must this go on?'" (R. 79).

Testimony of Mr. Melville, officer of tile setter's union:

"None of the firms who have entered into union contracts employ their head men or officers or partners as craftsmen in the industry since they signed the contract.

There has been a dearth of work in the industry for the last few years for craftsmen. If an employer is engaged in the industry, that has a tendency to lessen the number of union men who may be employed in the industry, and our aim is to give more work to the members of our craft. I think that the rule of the International Union to the effect that the union employe cannot work with a contractor who works with the tools of the trade who is not a practical craftsman has been there since we have been affiliated with the Bricklayers and Masons Union, July, 1918. I am referring to the provision in the constitution. That rule has not to my knowledge been set aside by the local.

There is a distinction between contractor and journeyman. He may be a contractor and a journeyman, or a contractor and not a journeyman.

Q. What does your union judge Mr. Senn?

A. We have not to date placed him in the journeyman.

Q. It is based on his failure to acquire the skill and craftsmanship as prescribed by the union in the last eight or ten years?

A. That is right as far as I should say" (R. 87-88).

Mr. Schreiber, secretary of the union, states it another way:

"As to the present purpose of the union in picketing Mr. Senn at the present time, our union, or, rather, the trade of the tile layers for the last two or three years has been so demoralized **by the outside fellows cutting into our trade**, which don't belong, and even

those who do go out contracting, and our union is so developed we have to do something to try to eliminate that source of supply'' (R. 83).

There is nothing novel in workers classifying and limiting the kind of work to be performed by different workers in the same industry. That a helper cannot do a journeyman's work is the universal rule in the building crafts. The unions maintain an extensive system known as craft jurisdiction, allocating to various crafts the work to be performed by each craft. Thus a stationary engineer able to perform electrical work may, nevertheless, be restrained from performing such work, since the jurisdiction to perform it is granted to the electrical craft. A carpenter able to install weather strips on windows may, nevertheless, be restrained from performing this work, since the jurisdiction to do it is granted to the sheet metal workers. These regulations make for better craftsmen, orderliness and fair distribution of labor. The union here says that an employer, as an employer, is in a different classification and should confine his activities to that of contractor and not craftsman, particularly so when he is not a craftsman according to union standards.

The union rule, therefore, prohibiting journeymen craftsmen from working with a contractor using the tools of the trade and who is not a craftsman within the definition of union rules is not arbitrary, unreasonable, and is for the protection of legitimate interests of union members. The unions believe that all employers should be unionized. They find that necessary for their welfare. They find, too, that one who is not a skilled craftsman should not displace men who are. There is as much justice and reason in this rule as there is in statutes prohibiting persons from practicing law, medicine, etc., who have not qualified according

to the rules prescribed. It would be tragic, indeed, for organized labor if courts were to say, in the furtherance of the interests of its craft, a union cannot prescribe such rules and cannot seek to foster and protect them.

We do not think the Court should so hold, for it would be in direct contravention of the public policy of the state. Sec. 133.07 (1) (Wis. Stats. 1935) declares:

> "**133.07. Working people may organize; injunction not to restrain certain acts.** (1) Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit."

C.

This Case Involves a Legitimate Economic Conflict and the Courts Should Not Intervene.

The issue therefore resolves itself down to this. The appellant is willing to sign a union contract, but not on the terms and conditions submitted by the union. Appellant will not unionize his plant, unless there be deleted from the contract the condition that he refrain from working with the tools of the trade as a tile setter and helper. It is the appellant's contention that such rule amounts to an illegal and unlawful demand because it invades his con-

stitutional right to work with his hands in the practical work of tile setters. The respondent unions, on the other hand, contend that the conditions submitted to the appellant that, in order to be accepted as a union contractor, he must refrain from working with the tools of the trade, is lawful, reasonable, arising out of the necessities of the craft, and for the promotion of their welfare and interest as workers in the industry; that the refusal by the appellant to sign the contract because it contains such reasonable rule is a refusal to comply with the request that he unionize his shop, and because of such refusal a labor dispute exists between the parties, entitling the respondents to the protection of the Wisconsin Labor Code and to exert such economic pressure as is declared to be lawful in furtherance of labor disputes.

Sentimental appeals and arguments do not meet the issue.

Appellant's approach may appeal to one from the sentimental viewpoint, that is, that the appellant cannot give up the right to work with the tools of the trade, since if he does, he faces ruin and will have to go out of business. Is the appellant any different than thousands of other business men who, for one cause or another, are subjected to demands which they cannot meet, for if they do they face ruin and will have to go out of business? Time and again employees demand of their employer increased wages or shorter hours, or better working conditions, and time and again the employees are met with the answer that to grant the demands will bring on ruin for the employer and cause him to go out of business. Has any court deigned to take sides in such a controversy to say to the employees: "Your demand of the employer that he pay one dollar an hour is illegal because the employer cannot continue in business if he has to pay that sum as wages"?

We do not know of a single decision so holding since those of one hundred years or more ago when it was held that laborers entering into combination for the purpose of demanding increased wages were engaged in an illegal conspiracy. In recent years, no courts have restrained employees from exerting economic pressure in furtherance of such demand, regardless of the fact that the employer will face ruin if he accedes to them.

It may well be that Mr. Senn, as a contractor, may be unable to meet the wages or conform to the hours or the other working conditions demanded without facing ruin and going out of business. This plea of facing ruin if the demands are met is not one for the courts to determine. Numerous employers make that same claim whenever any fundamental demand is made for the improvement of working conditions. The textile manufacturer of the North opposes abolition of child labor because it will put him at an economic disadvantage when he competes with the textile manufacturer of the South. Numerous employers made the same argument in respect to cost of improved sanitation—that it would reflect itself in the price of the sale of commodities, and those in competition with employers who are not subjected to this cost will be ruined. It is a recognized social and economic fact that some employers are not, and will not, be able to meet legislative demands, demands of labor, or other competitive demands, and will face ruin, but that does not place the stamp of illegality upon the demand.

The question here is a simple one. Has the union the right to seek unionization of a nonunion employer because his methods of operating his business are detrimental to the trade and craft in which the union employees are engaged? If they have, have they the right to establish rules and demand terms and conditions which are reasonable?

Now, here is a demand by a union to conform to a definite wage scale prevalent in the major portion of the industry; to conform to a fixed number of hours prevalent in the industry; to conform to rules of apprenticeship and other working conditions prevalent in the industry; and, to conform to a rule that the employer refrain from personally working with the tools of the trade, also prevalent in the industry. In the instant case, the latter requirement is as important and vital to the craftsmen affiliated with the respondent unions as are wages, hours, sanitation and other working conditions. Here is a craft where from 112 members in the union they have gone down to 41; a craft affiliated with that portion of industry known as building trades, which has suffered during the six years of the depression.

> "In the last four or five years the building industry has been depressed. There has been very little activity in the building industry. I assume that many tile setters have had to resort to other occupations in order to secure employment by which to live. I knew that some of the craftsmen were on relief. In 1935, the year 1935 showed a considerable increase over '34" (R. 76-77) (testimony of appellant).

As a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require this rule. The contention of the employer that he will be ruined and go out of business if he obeys the rule is answered by the contention of these employees that they will be ruined and have to work at conditions less than those considered consistent with a fair standard of living if he does not; and equally disastrous, the appellant's conduct will cause others to do as he does, and thus injury will result to their entire craft. As between the two, the employees say that from their viewpoint it is better for appellant to go out of busi-

ness than for them to have less than what is necessary for a fair livelihood.

This is an economic conflict. Why should the Court take sides with one or the other? Appellant may be able to secure all kinds of work from those who believe in nonunion principles. The unions are anxious that he should not secure work from those who believe in union principles.

Appellant is not without argument and economic persuasion in opposition to that of respondents. He has that potent argument, which most nonunion contractors have—the ability to offer cheaper bids because of cheaper labor cost—and we hardly believe the balance of economic persuasion is in favor of union workers, for cheap prices have a greater appeal than other economic considerations with many persons.

There is a vast field in which appellant may indulge his right to work as a nonunion contractor and to personally work with the tools of the trade.

John D. Edwards, a contractor for twelve years, stated that Senn had performed a dozen jobs for him in the year 1933-1934 (R. 81-82; Old R. 191). This man evidently subscribes to the principles of hiring nonunion contractors. If he and others like him have work to do, he has the right to give it to Senn and Senn has the right to perform it; and as has been stated the union does not question that right. All the union claims is its right to request Mr. Edwards not to give Senn the work. The compliance or lack of compliance with this request by Mr. Edwards is not an invasion of Mr. Edwards' right to give Mr. Senn the work or Mr. Senn to perform it. If Mr. Edwards' testimony is correct, and he being a witness called by the appellant, therefore his testimony should, in so far as appellant is concerned, be taken as a verity, then there is a vast field of work for the appellant. According to

Mr. Edwards, in the "home building" end of the business contractors never paid much attention to whether union or nonunion contractors "do the work." "In the home industry I would say 10 per cent are unionized" (Old R. 194). He admitted employing mostly nonunion labor because 90 per cent of the labor in home building is nonunion. If the field of activity is as large for the appellant as Mr. Edwards claims it to be the appellant surely should not complain of efforts on the part of the union to secure some of this work for their own employers and thereby for themselves.

(1) *In the economic conflict the appellant may use all lawful means at his command to convince the public to trade with him as a nonunion contractor.*

Appellant may use all propaganda at his command to foster nonunion principles. He may join organizations which are well known, and which spend millions in fostering nonunion and open-shop policies, etc. There are the Chambers of Commerce, etc. In Milwaukee County there has existed for many years an employers' council committed to an open-shop policy. There is nothing to prevent appellant from meeting argument with argument, and associating with organizations which will help him spread his nonunion beliefs or status.

Labor unions do not claim that such organizations are illegal or that such efforts on the part of the employers are illegal. They counter the attack by inducing workers to join labor unions and by inducing employers to unionize. Those who are recalcitrant are met with the publicity that such employers are antiunion, and the request is made that the public refrain from patronizing such nonunion employer. Such attempts by labor unions by the use of the primary boycott, picketing, solicitation

of customers, have been declared both by courts of many states and by the Wisconsin Labor Code to be lawful.

Appellant is a nonunion contractor. He refuses to be unionized on the terms and conditions prescribed by the respondents. The respondents, therefore, in an orderly manner are advising the public that appellant is a nonunion contractor and that he insists on working as a nonunion contractor. Because they have demanded that he unionize and because of his refusal to do so, they are in dispute with him.

We submit, in the exercise of his rights, the appellant may secure and do all the work he pleases. He may work with his employees and with the tools of the trade. He may work long hours; he may pay low wages. He may bid for contracts at a low figure based upon low wages and long hours. He may do all these things. Those are his rights, nor do we question his right to do these things. The union members, on the contrary, are in competition with him, and the employers for whom they work are in competition with him. These union men want work for themselves, and consequently more jobs for their employers to furnish them with work. They want to maintain a standard of better wages, regulated hours and improved working conditions. Those are the rights of the union. They, therefore, have the right to oppose appellant on the economic field by informing the world that he is a low-wage contractor, a long-hour advocate, and one who insists on working with the tools of the trade in competition with his workers. Through this notification to the public they propose to compete with appellant for tile work jobs. They propose, by this notification to the world, to secure employment for themselves instead of the appellant securing it for himself. This economic conflict creates a "labor dispute" within the definitions of

the code, and in furtherance of it the conduct indulged in by respondents is expressly declared to be lawful by the Labor Code.

The right of respondents to publicize the dispute is very ably set forth in the case of **S. A. Clark L. Co. v. Cleveland, W. & D. Local No. 106** (Ohio), 154 N. E. 362:

> "**We take it that it will be conceded that the plaintiff company in the instant case had a legal right to reject the proposals of the union, and had the right to employ whom it desired to employ, at wages and under conditions of its own choice. But here its legal rights ended in respect to the matter in dispute.** It had no vested claim to the patronage of those whose interests were adversely affected by its actions, nor did it have any vested right to the patronage of any class of persons, or any person, who, knowing of the situation and of its rejection of the proposals of the defendants, did not wish to give it his business. **On the other hand, the defendants, by reason of their obligation to competitors who employed union labor, and for the protection of their members, had a legal right in a lawful way to influence and control the patronage of their members and of their friends in favor of themselves and those with whom they had contracts.** * * * The plaintiff, having determined to operate its business as a nonunion concern, and having refused to employ union labor, may not reasonably expect, nor has it the right to expect, the latter's business and support; and, furthermore, **it has no legal right to prevent a lawful publicity of its actions in this behalf by union labor.**
>
> "It is shown that the acts complained of are causing the plaintiff a substantial loss of its business and profits. This fact furnishes no basis for judicial interference, for the plaintiff had no vested property right in the business or lost by it. This is so for the reason that, while it had a legal right to determine

its course of action, it must be held to have considered in that connection the influence of union labor on the public and the benefit of its support and patronage. • • •"

To the same effect, **Exchange Bakery & Restaurant v. Rifkin**, supra.

Blumauer v. Local No. 159, 141 Ore. 399:

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner when its members have reasonable ground to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees, generally, or of those in a particular trade or calling, **even though there may be no direct controversy between the employer and his immediate employees.**" See, also, **Goldfinger v. Feintuch**, 288 N. Y. S. 855; **Nann v. Raimist**, 255 N. Y. 307, 174 N. E. 690; **Stillwell Theater Co. v. Kaplan**, 259 N. Y. 405, 182 N. E. 63.

II

THE WISCONSIN LABOR CODE INCORPORATES INTO STATUTORY FORM THE PRINCIPLES WHICH HAVE ALWAYS BEEN THE RULE OF THE COMMON LAW IN THIS AND OTHER STATES. THE PRINCIPLE LEGALIZING CERTAIN PEACEFUL ACTS IN LABOR DISPUTES DOES NOT DEPRIVE APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DOES IT DENY TO HIM THE EQUAL PROTECTION OF THE LAWS.

The Wisconsin Labor Code is more than a limitation on the power of courts to issue injunctions in labor disputes.

Such limitation on the jurisdiction of the courts results from an incorporation into the Wisconsin law of a substantive rule of law that has always prevailed in Wisconsin. The effect of such rule, both before the Wisconsin Labor Code was passed and since its passage, is not that the jurisdiction of the Court is limited, but that there has been nothing left for this jurisdiction to operate upon. It is to be noted that Section 103.53, Subsection 1, of the Wisconsin Labor Code, reads as follows:

> "103.53. Lawful conduct in labor disputes. (1) **The following acts, whether performed singly or in concert, shall be legal.**"

Then follows an enumeration of the acts which are declared to be lawful, such as peaceful picketing, patrolling, persuasion and advertising, etc. It is apparent that this then has become a rule of substantive law and not one directed merely to jurisdiction of the courts. We refer the Court to that part of the decision in the American Furniture Company case, 268 N. W. 250, set out in the appendix, wherein this proposition is discussed in connection with the appellant's assertion that the State Legislature had illegally limited jurisdiction of the state courts in contravention of the Wisconsin Constitution, Article I, Sections 1, 9 and 22, and Article VII, Sections 2 and 8:

> "The next contention is that the Wisconsin Labor Code, if construed to deny injunctive relief in such a situation as was here presented, is violative of secs. (1), (9) and (22) of Art. I, and secs. (2) and (8) of Art. VII of the Constitution of Wisconsin. Art. VII, sec. (2), vests the judicial power in this state both in matters in law and equity in the Supreme Court, Circuit Courts, etc. Sec. (8) of Art. VII confers original jurisdiction upon certain courts and confers upon them the power to issue writs of injunction necessary to

carry into effect their orders, judgments and decrees. Art. I, sec. (9), provides that every person is entitled to a certain remedy in the laws for all injury or wrongs which he may have received in his person, property, or character. The act is claimed invalidly to limit the equitable powers of the circuit court. It is not necessary to discuss here the undoubted limitations upon the power of the legislature to diminish the jurisdiction of the Circuit Court. It is beyond question that the legislature may change the substantive law and in doing so increase or reduce the subject matter upon which the jurisdiction of courts operate. It may enact a statute creating a crime or repeal such a statute. The first enactment does not increase nor does the latter diminish the jurisdiction of a court. It merely is an exercise of the power of the legislature to declare the public policy of the state and punish offenses against its sovereignty. Unless there is some other constitutional objection, such laws would not be invalid as interferences with the jurisdiction of the courts. When the legislature makes peaceful picketing valid under certain prescribed circumstances it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character."

Thus it is apparent that the Wisconsin Labor Code does not "deny relief," as is asserted by the appellant. It makes certain acts in certain situations legal acts. One of those situations is one in which there is a "controversy concerning terms or conditions of employment • • • or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee" (103.62, Wis. Stats.). This section of the statute has been construed to apply to the facts in the instant case. This construction was arrived at by taking

into consideration legislative intent and the arguments advanced in support of the Norris-La Guardia Act (as disclosed by the committee reports set out in the Appendix, pp. 39-117). It was found by the Wisconsin court in the case of American Furniture Co. v. I. B. of T. C. & H. A., 268 N. W. 250, that the express wording of the act "regardless of whether or not the disputants stand in the proximate relation of employer and employee" was meant to include the precise situation herein; that is, it is not necessary that the employees be employees of the particular employer involved. It is sufficient if both employer and the organization of employees are engaged in the same trade, craft or industry. This construction of the state act is not subject to attack here. The statute must be considered as it was so construed. **Hartford Accident & Indemnity Company v. N. O. Nelson Manufacturing Company**, 291 U. S. 352, 54 Sup. Ct. 392, 78 L. Ed. 840; **Ward & Gow v. Krinski**, 259 U. S. 503, 42 Sup. Ct. Rep. 529, 66 L. Ed. 1033. The appellant attacks the constitutionality of the Code so construed and presents that argument under three distinct points: (1) The Code deprives the appellant of property without due process of law; (2) the Code is a denial to the appellant of the equal protection of the laws; and (3) deprives the appellant of liberty and property without due process of law and equal protection of the law. The cases cited by the appellant deal with all three points, and therefore the points made by the appellant may be more logically discussed herein as one argument.

A.

While the Instant Case Was Decided on the Authority of the Construction of the Wisconsin Labor Code by the Supreme Court of the State of Wisconsin in the American Furniture Company Case, That Case Should Be Considered Only on the Rule of Construction Therein Decided and Must Be Distinguished on the Factual Basis.

We desire to call the Court's attention to the relationship of the American Furniture Company case to the case at bar. While the constitutionality of the Wisconsin Labor Code in the instant case is premised on the conclusions reached by the Wisconsin Court in the American Furniture Company case, supra, it is expressly acknowledged in the case at bar that the facts are to be distinguished from that case:

> "• • • It will readily appear that there are elements involved in this controversy not present in the case of **American Furniture Company v. I. B. of T. C. & H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee** (Wis.), 268 N. W. 250, decided. The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant unions, because the practices sought to be prevented can so

readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood these craftsmen find it necessary to require employers to comply with the terms of article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work."

Appellant endeavors to attack the constitutionality of the Wisconsin Labor Code because of the application of the code to the factual circumstances in the American Furniture Company case. Appellant argues that in the case at bar no employee of his is a member of the respondent union and therefore the demands upon him by the respondent unions are not within the purview of the code, and if they are within the purview of the code as a labor dispute, such as is defined therein, the act as so construed is unconstitutional. This was the contention in the American Furniture Company case as applied to the facts of that case. Such contention was decided against the appellant in that case, and if that decision is correct it is equally applicable to the appellant's position in the case at bar. However, if such construction was incorrect in the American Furniture Company case, as applied to the facts in that case, it is not determinative of the correctness or incorrectness of such construction in its application to the facts in the present case. In the American Furniture Company case the employer claimed that he could not enter into a union contract because of the unanimous refusal of his employees to join the union. In the case at bar there is no such issue. The employees of the plaintiff, in so far as the record in this case is concerned, have made no objection to a union

status. The employer makes no contention that he cannot enter into the union contract because of the refusal of his employees to affiliate with the unions. On the contrary, he is willing to enter into the union contract providing the respondents will waive article III of the proposed agreement and permit him to work in competition with his union employees. Therefore, point III, relied upon by appellant in his brief to the effect that "Inasmuch as none of Senn's employees are members of appellee unions, and said unions represented none of his employees, the statutes, construed so as to deny Senn the right to relief from picketing and related activities by said unions, deprived him of liberty and property without due process and denied him the equal protection of the laws," is not applicable to the case at bar. The test of constitutionality, in so far as the Wisconsin Labor Code is concerned in the case at bar, must be tested on the basis of whether the appellant is deprived of his property without due process of law and denied the equal protection of the laws by virtue of the request made upon him to unionize his plant and comply with article III of the proposed agreement and article XX, section 6, of the union constitution, to wit, to abstain from working with the tools of the trade in competition with his union employees.

B.

The Wisconsin Labor Code, as Construed by the Court, Is a Valid Exercise of the Police Power of the States. It Does Not Deprive the Appellant of His Liberty or Property Without Due Process of Law.

(1) *United States Supreme Court cases discussed.*

It is axiomatic that when a state legislature passes certain laws in the legitimate exercise of the police power

of the state for the protection of the public health, safety and morals of the people of the state, those laws, even if they should limit to a certain extent the rights and liberties of some individuals, are not in violation of the Fourteenth Amendment to the Constitution. We do not care to burden the Court with an involved discussion of this academic proposition, since it has been presented to and determined by this Court on numerous occasions. Each case must be tested on its own particular facts. So we turn to the laws and cases applicable to the present situation.

Appellant places great reliance on the case of **Truax v. Corrigan**, 257 U. S. 312. We believe that the extended analysis of that case made by the Wisconsin court in the American Furniture Company case is an accurate statement of the true meaning and importance of that case and sufficiently demonstrates its inapplicability to the case at bar for the purpose of sustaining appellant's position, and that it is applicable to the case at bar in support of respondent's position:

> "That the act as so construed is unconstitutional is the next assertion made by the plaintiff. The first contention is that the act is invalid under the Fourteenth Amendment because it authorizes an unwarranted and unreasonable interference with the right of plaintiff to carry on its business and that of its employees to bargain collectively, that it denies plaintiff equal protection of the laws, and that it is not a legitimate exercise of the police power. Plaintiff's principal reliance is upon the case of Truax v. Corrigan, 257 U. S. 312.
>
> "In the **Truax case** plaintiffs owned a restaurant in the City of Bisbee, Arizona. The defendants were cooks and waiters formerly in plaintiff's employ, and

the labor union and trades' assembly of which they were members. In April, 1916, a dispute arose between plaintiffs and the union concerning terms and conditions of employment of members of the union employed by plaintiff. Plaintiff refused the demands of the union, and it ordered a strike of its members who were in plaintiff's employ. Thereafter defendants entered into a conspiracy and boycott to enforce the demands of the union. The method included picketing, displaying banners, advertising the strike denouncing plaintiffs as unfair to the union, **circulation of handbills containing abusive and libelous charges against plaintiffs and intimidations of injury to future patrons**. The State of Arizona had a statute with provisions substantially similar to those of the Clayton Act. It was argued that if these provisions made defendants' acts lawful, plaintiffs' rights under the Fourteenth Amendment were violated and the law void. The state courts dismissed the complaint. The state Supreme Court took the position that the gist of plaintiffs' charges was that defendants were merely inducing patrons to cease patronage by making public the fact of the dispute and the attitude of plaintiffs in it; that no man has a fixed property right in the esteem of the public; that while plaintiff had a right to refuse the demands of the union, the union had a right to advertise the cause of the strike; that picketing, if peacefully carried out for a lawful purpose, was not a violation of plaintiff's rights under the Arizona statute; and that while picketing was unlawful in Arizona prior to this act, plaintiffs had no vested right to have such a rule continue in that state. The Supreme Court of the United States held that under the statute as thus construed picketing may be exercised in any form without invading plaintiffs' rights, providing violence is not employed. The Court describes the method of picketing by defendants as follows: (1) having agents of the union walk back

and forth constantly during business hours displaying a banner announcing that the restaurant was unfair to cooks, waiters and their union; (2) having these agents attend at or near the entrance to the restaurant and announce the same matters in a loud tone of voice; (3) characterizing employees of plaintiff as scab Mexican labor and applying approbrious epithets to them in handbills circulated to would-be customers in front of the restaurant; (4) including in such handbills abusive and libelous attacks upon the senior member of plaintiffs' firm; (5) seeking to disparage food, service and prices and general conduct of plaintiffs' restaurant; (6) attacking the character of those who would patronize the restaurant; and (7) threatening those who disregarded the urging of the pickets and actually patronized plaintiffs' restaurant. The Court states the real question to be whether the means used were legal and concludes that they were not, and that the defendants' acts constituted palpable wrongs. The Court states:

> "'It was not unlawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. • • • It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy.'

"It was held that an act which operates to make lawful such a wrong deprives the owner of the business of property without due process and is void under the Fourteenth Amendment. In reply to the contention that this was a proper exercise of the police power and that property rights must yield to such power reasonably exercised, the Court says:

> "'The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no

special relation to him and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement.'

"It is pointed out that this is not a mere case of a peaceful secondary boycott as to the illegality of which courts have differed. Here the illegality of the means was without doubt and fundamental. The means used were libelous and abusive attacks on the plaintiffs' reputation like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business. To permit these definitely illegal acts and to decline to give a remedy effective against them would be to deny and disregard fundamental rights of liberty and property. Under the Constitution of Arizona the plaintiffs would have had the right to an injunction. If defendants' acts had been done as the result of any other controversy than a labor dispute, an injunction would necessarily have issued. To deny it in this case would be to deny equal protection of the laws.

"It seems to us that this case is not applicable to the present situation. As we read the case, it is held that with respect to acts constituting libel, slander, intimidation, threats, breaches of the peace or threatened breaches of the peace, which are recognized as definitely illegal, statutory immunity from legal redress cannot validly be conferred upon the labor unions, and the legislature must retain and give effect to all legal and equitable remedies created by the Constitution for the enforcement of rights and the redress of wrongs. See 13 N. Y. U. L. Q. Rev. 92 at 96. It is not apparent to us, however, that the legislature may not recognize the peculiar status of labor organizations in labor disputes because of the

self-interest of the union and its members and the assumed necessity for protective group action and confer an immunity with respect to acts involving none of these wrongful features whether they take the form of picketing or not. There is no substantial question of classification. To hold that there was would put into the question the validity of both the Clayton Act, the Norris-La Guardia Act and the Wisconsin Labor Code, no matter how these acts are construed.

"The question is whether the legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to give labor an economic weapon which tends to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provisions which denies this power to the legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces. **We cannot say that the legislature may not validly permit acts on the part of labor organizations not intrinsically wrongful as involving violence, intimidation, or misrepresentation, the purpose of which is to give notoriety to the attitude of the employer in a labor dispute. That the philosophy underlying such immunities is that the worker should have some economic advantage to balance that theretofore held by the employer and arising out of the control of jobs, is not a sufficient reason for denial of the legislative power, or for the conclusion that the exercise of this power results in the impairment of the constitutional rights of the employer. If it is, then the act cannot be sustained on any construction.**

The presence of a few union members in plaintiff's employ or the existence of a dispute between plaintiff and its employees would not be a circumstance sufficient to validate immunities extended to those not in plaintiff's employment, if these immunities were intrinsically beyond the power of the legislature to confer. Assuming a dispute between employer and employee, the only justification for extending the provisions of the code to outside organizations is their general self-interest in procuring satisfactory working and bargaining conditions in the craft or industry represented, and this interest exists whether the employees are in dispute with their employers or not. We conclude that the act as we construe it does not deny to plaintiff due process or equal protection of the laws and is a valid exercise of legislative power so far as this objection is concerned. Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and view theretofore expressed in judicial opinions." (Emphasis ours.)

Likewise in the case of **Fenske Brothers v. Upholsterers International Union**, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318, the Illinois Supreme Court, in discussing the validity of the Illinois Anti-injunction Act, held such act to be constitutional. In the course of its opinion the Illinois Court distinguishes **Truax v. Corrigan**, supra, in this way:

> "In **Truax v. Corrigan**, 257 U. S. 312, 42 S. Ct. 124, 126, 66 L. Ed. 254, 27 A. L. R. 375, which is largely relied upon by appellees, an Arizona law similar to the statute in controversy, was held to contravene the

due process and equal rights clauses of the Federal Constitution. In that case Truax and others, who operated a restaurant, refused to accede to the demands of the union concerning the terms and conditions of employment of certain cooks and waiters, and a strike was called. A conspiracy and boycott to injure the proprietors in their business by inducing customers and other favorably disposed persons to cease patronizing them were entered into. The methods used included picketing, displaying banners advertising the strike, denouncing the proprietors as 'unfair' to the union, appealing to customers to stay away, and the circulation of handbills containing abusive and libelous charges against the employers, their employees and patrons, with intimations of injury to future patrons. A complaint for an injunction was filed reciting the facts. The business was injured and a showing of irreparable damages was made. The Arizona Supreme Court (20 Ariz. 7, 176 P. 570) affirmed an order of the trial court sustaining a demurrer and dismissing the complaint. The cause reached the Supreme Court of the United States upon the writ of error. An examination of the opinion discloses that it is based, not upon the provisions of the Arizona act, but upon its effect as construed by the Supreme Court of that state. The Arizona Court held that plaintiffs did not claim defendants had by violent means invaded their rights, and that, if that kind of picketing were charged and established by proof, plaintiffs would be entitled to relief to the extent of prohibiting violence in any form. In the opinion of the United States Supreme Court, Mr. Chief Justice Taft said: 'The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by "picketing" in any form if violence be not used, and that because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlaw-

fully invade complainants' rights. The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. • • • The only respect in such a case in which this Court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute. • • • The real question here is: Were the means used illegal? The above recital of what the defendants did can leave no doubt of that.' After a brief resume of the acts committed, including the 'threats of injurious consequences to future customers,' all linked together in a campaign, the Court held they were not lawful persuasion or inducing, and that violence could not have been more effective. Upon this basis it was held that the Arizona statute, as construed by the Supreme Court of that state, violated the due process and equal rights clauses of the Federal Constitution. **Plainly there was no intention on the part of the United States Supreme Court to hold the statute invalid because of its provisions as to peaceful picketing. Those provisions as a test of invalidity were not in any way applied.**" (Emphasis ours.) (Certiorari denied 79 U. S. L. Ed. 1682, 55 Sup. Ct. 645).

Summarizing briefly, the Truax decision rested upon two propositions: (1) The acts alleged in the complaint and admitted by demurrer were acts which were tortious in and of themselves—their tortious character lay not in the purposes toward which they were directed, and (2) since those acts were tortious it was held that to deprive the employer of a remedy by injunction against such tortious acts was to deprive the employer of equal protection of the laws, and to deprive him of his property without due process of law. The United States Supreme Court held

that where certain actions were tortious per se, it would be a violation of the Fourteenth Amendment and not a valid exercise of the state police power to deny to the complainants their right of remedy by injunction. **The Court did not hold, however, that where labor disputes are involved, an act restricting the power of courts to issue injunctions against peaceful acts was an unconstitutional deprivation of property, or a denial of equal protection of the laws.**

In the instant case, after a trial on the merits, the Court found that the only tortious acts consisted of a proposed secondary boybott, which the defendants, through their counsel, agreed to withdraw and to cease further activities in that direction. Since the act requires that the Court shall be satisfied that the unlawful acts complained of "will be executed or continued unless restrained" (Sec. 103.56, Wis. Stats.), the Court both under the act and under the general principles of equity being satisfied that such acts will not be continued, did not issue an injunction. This ruling of the trial court was affirmed by the court of last resort in Wisconsin, Justice Fairchild saying:

> "It appears when issue was first joined between the parties, considerable spirit was manifested on both sides, and evidently acts occurred calculated to intimidate appellant and bring about a secondary boycott. The trial court said:
>
> " 'That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors or architects, as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful act will be committed or will be executed or continued';
>
> "The discretion of the trial court in determining that there is no occasion for a restraining order in the

particular suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved."

Also, in the case of **United Chain Theatres v. Philadelphia M. P. M. O. Union**, 50 Fed. (2d) 189, in referring to the issuance of an injunction against certain acts, which acts counsel for the defendants advised the Court would not be continued, the Court said:

> "Specifically, in the regard to the matter just referred to, my finding is that the conduct criticized has been discontinued, and there is no reason to apprehend that it will be resumed."

It is apparent that the **Truax case** does not go to the proposition here involved, and that the **Truax case** is really in support of respondent's contention that where the acts complained of are peaceful and without violence or intimidation and for the purposes sought to be accomplished such acts are in furtherance of the legitimate purposes and objects for which working men organize. A failure to deny relief by way of injunction is not in violation of the Fourteenth Amendment of the United States Constitution. The appellant has also relied upon **Coppage v. Kansas**, 236 U. S. 1, 59 L. Ed. 441; **Truax v. Raich**, 239 U. S. 33, 60 L. Ed. 131; **Hitchman Coal & Coke Company v. Mitchell**, 245 U. S. 229, 62 L. Ed. 260, and **Adair v. U. S.**, 208 U. S. 161, 52 L. Ed. 436. The **Hitchman case**, supra, has already been disposed of by this Court in the case of **American Steel Foundries Company v. Tri-City Central Trades Council**, 257 U. S. 184, wherein it was said:

> **"The unlawful and deceitful means used were quite enough to sustain the decision of the Court without**

more. The statement of the purpose of the claim is sufficient to show the remoteness of the benefit ultimately to be derived by the members of the International Union from its success and the formidable country wide and dangerous character of the control of interstate commerce sought. The circumstances of the case make it no authority for the contention here."

The **Coppage case**, supra, relied upon by the appellant, is one involving a state statute which imposed criminal penalties on employers and did not involve anti-injunction statutes patterned after the Norris-La Guardia Act. As was stated in the case of **Starr v. Laundry and Dry Cleaning Workers**, supra:

"The **Coppage case** construes laws making it a criminal offense for an employer to enter into a contract with an employee containing a clause to the effect that the employee will refrain from joining a labor union during the term of his employment. The question of striking by employees is not involved. Neither is the question of picketing, nor the propriety or legality of the statutory provisions prescribing procedure in cases wherein injunctive relief is sought. To attempt to impute criminality to an act that is sanctioned by the Constitution is obviously different from prescribing a special procedure to be followed to obtain injunctive relief in a special class of cases."

It must also be noted that in the case of **Texas & N. O. R. Co. v. Brotherhood of Railway Clerks**, 281 U. S. 548, 74 L. Ed. 1035, both the Adair and Coppage cases were rejected by a unanimous court, and Chief Justice Hughes, speaking for the court, rendered innocuous those decisions. Among other things, the Court said:

"Exercising this authority, Congress may facilitate

amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping this legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practical measures. **The legality of collective action on the part of employes to safeguard their proper interests is not to be disputed.** It has long been recognized that employes are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. • • • Congress was not required to ignore this right of the employes but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than strife. • • •"

We have discussed the case of **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, and the case of **American Steel Foundries Company v. Tri-City Central Trades Council**, 257 U. S. 184, in the briefs submitted herewith on the question of jurisdiction. We wish only to call to the Court's attention at this time the decision by this Court in the **Tri-City case.** We notice that counsel for appellant has assiduously avoided that decision in his brief. We believe that that decision effectively sets at rest the constitutional question raised by the appellant in this appeal. We quote the following:

"The object and problem of Congress in Section 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, **recent** or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. • • •

"Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. **The right to combine for such a lawful purpose has in many years not been denied by this court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.** It is impossible to hold such persuasion and propaganda without more, to be without

> excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to local labor unions, in such a case as this, seems to us to be unreasonable." (Emphasis ours.)

And we also refer the Court to the fact that both the **Hitchman** and **Duplex cases** are distinguished in the Tri-City case.

(2) *Discussion of state court and lower federal court cases sustaining constitutionality of the act as construed.*

The constitutionality of the Norris-La Guardia Act and the state anti-injunction acts, which are patterned after the Norris-La Guardia Act, has been raised and decided in the lower state and federal courts. In the federal courts, the constitutionality of the Norris-La Guardia Act has been sustained in the cases of **United Electric Coal Company v. Rice**, 80 Fed. (2d) 1 (C. C. A. 7th) Cert. denied 297 U. S. 714, 80 L. Ed. 1000); **Levering & Garrigues v. Morrin**, 71 Fed. (2d) 284 (C. C. A. 2d) (Cert. denied 293 U. S. 595, 79 L. Ed. 688); **Miller Parlor Furniture Company v. Furniture W. I. Union** (N. J.), 8 Fed. Supp. 209; **Cinderella Theatre Company v. Sign Writers Local Union** (Mich.), 6 Fed. Supp. 164; **Dean v. Mayo** (La.), 8 Fed. Supp. 73.

In the **Levering, Miller, Cinderella** and **Dean cases** (supra), the act was construed, as was the act in the instant case, to apply to situations wherein there was a controversy between an employer and members of a labor union engaged in the same trade, craft or industry as the employer, but who are not employees of such employer. In all these cases the contention now made by the appellant in the instant case was decided adversely to such con-

tention, and the federal courts concluded that not only was the Federal Act applicable to such situation, but that when applied to such situation it was not unconstitutional. In the state courts, the constitutionality of the state anti-injunction acts was raised in the following cases and with specific reference to the Fourteenth Amendment of the United States Constitution:

Fenske v. Upholsterers International Union, 358 Ill. 239, 193 N. E. 112 (Cert. denied), 79 U. S. L. Ed. 1682, 55 Sup. Ct. 645;

Dehan v. Hotel & Restaurant Employees Union (La.), 159 So. 637;

Aberdeen Restaurant Corporation v. Gottfried, 285 N. Y. Supp. 832;

Starr v. Laundry & Dry Cleaning Workers Union (Ore.) (not yet officially reported), 63 Pac. (2d) 1104;

Wallace v. International Association of Mechanics (a companion case to **Starr v. Laundry & Dry Cleaning Workers Union**, supra) (not yet officially reported), 63 Pac. (2d);

American Furniture Company v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 209 of Milwaukee (not yet officially reported), 268 N. W. 250, set out in the appendix at pages 1 to 28).

In the **American Furniture Company case**, supra, and the **Wallace case**, supra, the code was applied to a situation wherein none of the employees of the employer were members of the defendant unions. We have already discussed the American Furniture Company case. In the case of **Wallace v. International Association of Mechanics** the constitutionality of the act on federal constitutional grounds is upheld as against the contention made by the

appellant in the instant case. Since this case is the most recent one on the subject, we take the liberty of quoting from it at some length:

"After the decision in the **Duplex** case was tendered, injunctions in labor controversies seemed to be the order of the day. Many disinterested persons were highly critical of the courts because of such intervention. Congress was besieged with various bills seeking to restrict the power of courts to issue injunctions in cases involving dynamic social and economic problems. In the great economic struggle between capital and labor, the decided trend of public opinion seemed to be towards the conviction that labor is entitled, through the medium of collective bargaining, to a greater recognition of its rights and that legislation should be enacted further to foster the welfare and interests of the wage-earner. This crystallization of public opinion in favor of the man who earns his livelihood by the sweat of his brow culminated in the passage of the Norris-La Guardia Act. See: **The Labor Injunction** by Frankfurter and Greene. Also Oakes on **Organized Labor and Industrial Conflicts**; 84 Pa. Law Review 771; 30 Mich. Law Review 1257; 16 Minn. Law Review 639.

"The enactment of the Norris-La Guardia Act and laws patterned after it undoubtedly marks the dawn of a new era in the domain of labor injunctions. Whether such legislation is in the best interests of the commonwealth is a legislative and not a judicial question. The function of the court is to declare the law as it is and not what it thinks it ought to be. Of course, if the act is clearly unconstitutional, the court should not hesitate so to declare; but, if not invalid, the act should be given full force and effect and not be whittled away by judicial construction. Too often drastic laws are passed with the apparent expectation that when litigation arises out of their application courts will so construe them, in the face

of plain and explicit language to the contrary, that no hardship will result. Needless to say, under our constitutional system of government, such is not the function of the judiciary.

"The right of labor to organize and to engage in collective bargaining is now universally recognized. How far a labor organization may go in the furtherance of its interests is a matter, however, upon which courts disagree. To attain their objectives such organizations at times resort to the strike and picketing. A few courts still look upon picketing as wrongful per se and an unlawful interference with the right of the employer to transact business. They hold, in effect, that there can be no such thing as lawful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. The great majority of courts, including the United States Supreme Court (**American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. 72, 27 A. L. R. 360), however, sustain the right of peaceful picketing. The doctrine that picketing is necessarily a species of coercion and intimidation is dogma long since discarded (**Exchange Bakery & Restaurant, Inc., v. Rifkin**, 245 N. Y. 260, 157 N. E. 130; **Goldfinger v. Feintuch**, 288 N. Y. S. 855). If merely peaceful picketing were in and of itself coercion, there could never be peaceful picketing in any case, for coercion is never lawful. As stated in **Bayonne Textile Corp. v. American Federation of Silk Workers**, 116 N. J. Eq. 146, 172 Atl. 551, 92 A. L. R. 1450:

> "'The modern view is that picketing is not per se unlawful and should not be enjoined if peacefully carried on for a lawful purpose.'

"This court has long recognized the right of peaceful picketing when done for a lawful purpose. **Blumauer v. Portland M. F. M. O. P. Union**, 141 Or. 399, 17 P. (2d) 1115; **Moreland Theatres Corporation v.**

M. P. Union, 140 Or. 34, 12 P. (2d) 333; **Crouch v. Central Labor Council,** 134 Or. 612, 293 P. 729; **Greenfield v. Central Labor Council,** 104 Or. 236, 192 P. 783, 207 P. 168. It is an appeal to the public and to members of the union not to patronize an employer who does not conform to the standards of organized labor relative to wages, hours and conditions of employment. The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is *damnum absque injuria.* No person has a vested right to the patronage of those who are not in accord with his standards of employment. **United Chain Theatres v. Philadelphia M. P. M. O. Union,** 50 F. (2d) 189; **S. A. Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local,** 22 Ohio App. 265, 154 N. E. 362. Such loss, under our social and economic system, is merely the result of a conflict of interests between capital and labor. What has been said thus far is on the assumption that violence, intimidation and coercion are foreign to peaceful picketing. No court has ever upheld the right to injure or destroy a business through a tortious act.

"We agree fully with the contention of the plaintiffs that there must be a reasonable justification for picketing. There must be an actual bona fide dispute. Picketing must be peacefully carried on and it must be for a lawful purpose. When the purpose of picketing is to injure or destroy a business rather than to further the common interests of the worker, it is an unlawful interference with the property rights of the employer and should be enjoined. **Blumauer v. Portland M. F. M. O. P. Union,** supra.

"The decisions of this court are not clear as to whether there can be picketing in the absence of a strike. **Moreland Theatres Corporation v. M. P. Union,** supra; **Greenfield v. Central Labor Council,** supra. Without any attempt to reconcile all that has been

said on the subject, we think the **better reasoned cases are to the effect that a strike and picketing are not necessarily concomitant. There may be a strike without picketing and picketing without a strike.** Each is a combative weapon which labor may use to accomplish its objectives if the same be lawful. The mere fact, therefore, that no strike existed, so far as the Chevrolet Company and Wentworth & Irwin are concerned, does not in itself preclude the defendants from picketing the plaintiffs' places of business. **Exchange Bakery v. Rifkin**, supra.

"Having expressed our views relative to the law applicable to picketing, we come to the vital question: Do the facts disclose a labor dispute within the meaning of the statute? We are convinced that the Norris-La Guardia Act—after which our statute was patterned—was designed to overcome the interpretation given to the Clayton Act by the United States Supreme Court in **Duplex Printing Press Co. v. Deering**, supra. The Senate and House Committee reports so indicate: Senate Report No. 163, 72d Congress (1932); H. R. Report No. 669, 72d Congress. **If the Norris-La Guardia Act does not place greater restrictions upon the power of courts to issue injunctions in industrial controversies, the enactment of the law—aside from its provisions relative to 'Yellow Dog Contracts'—was indeed vain and idle.**

"Clearly one of the principal purposes of the act was to protect labor from the abuses of unrestrained issuance of injunctions in industrial controversies. The act is a plain mandate to the courts not to grant equitable relief in labor disputes, unless fraud, violence or intimidation is involved. To relieve any doubt as to what constitutes a labor dispute, the legislature not only defined the same under subdivision 3 of section 13 of the act, but also provided in the preceding subdivision of the same section what person or association shall be deemed to have participated

in such dispute. The definition of a labor dispute is so broad and comprehensive that it undoubtedly extends the scope of the Clayton Act as interpreted by the United States Supreme Court by placing a greater restriction upon courts in the matter of issuing injunctions. We are convinced that the immunity from injunctions clearly extends to disputes between persons engaged in the same industry or craft who have a 'direct or indirect' interest therein, and is not limited to disputes between an employer and his immediate employees. The act provides that an association of employees has an interest in a labor dispute, **'regardless of whether or not the disputants stand in the proximate relation of employer and employee.'** If there were any doubt as to the intention of Congress in enacting the Norris-La Guardia Act it ought to be removed by the following language of the report of the House Committee on the Judiciary, favoring the passage of the bill:

> " 'Section 13 contains definitions which speak for themselves. It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of **Duplex Printing Co. v. Deering**, supra, wherein the Supreme Court reversed the circuit court of appeals and held that the inhibition of section 20 of the Clayton Act only related to those occupying the position of employer or employee and no others.'

"Also note the following language of the Senate Committee on the Judiciary:

> " 'Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

" 'The main purpose of these definitions is to provide for limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

" 'The proposed bill is designed primarily as a practical means of remedying existing evils and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protection of the procedure required.'

"To restrict the act to controversies between employer and employee would run counter to the plain intent of the legislature and would undoubtedly defeat the very purpose of labor organizations having as objectives improved standards in wages, hours and conditions of labor. In considering the Clayton Act, Mr. Chief Justice Taft, speaking for the court in **American Foundries v. Tri-City Trades Council**, supra, said:

" 'The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination

extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious.'

"Is it probable that the court would depart from such reasoning upon a consideration of the clear and explicit provisions of the Norris-La Guardia Act?

"The mere fact that the employees are not complaining against the terms and conditions of employment under which they are working is not conclusive. In many instances where sweatshop conditions prevail—although not in the instant cases—the employee, through the greed and avarice of capital, is bound down in abject physical and mental slavery. It is idle to talk about the protest of the individual laborer under such conditions. How can an employee exercise freedom of thought and expression when hungry children are dependent upon him for support? Protest against terms and conditions of employment with some employers simply means that the wage earner goes home without a job. It is through concerted action and collective bargaining that the laborer hopes for some semblance of economic freedom.

"On the other hand, the court is not unmindful that organized labor has, in some instances, assumed a domineering and dictatorial attitude inimical not only to the best interests of labor but to general public. It is only when capital and labor have due regard for the rights of each other that a wholesome condition exists. When selfishness and greed prevail, the innocent public in most instances suffers most. To devise

more efficient and expeditious methods for the adjustment of differences in these industrial controversies has ever been a vexatious problem for the legislative branch of the government and, like Banquo's ghost, it will not down. Whatever may be the best solution of the problem, we are convinced it is not through government by injunction.

"That the act in question is not confined merely to a labor dispute between an employer and his immediate employees, see: **Levering & Garrigues Co. v. Morrin**, decided in 1934, 71 F. (2d) 284, certiorari denied in 293 U. S. 595; **Dehan v. Hotel and Restaurant Employees etc. Local Union** (La.), decided in 1935, 159 So. 637; **Cinderella Theatre Co. v. Sign Writers' Local Union** (Dist. Court, Mich.), 6 F. Supp. 164; **American Furniture Co. v. I. B. of T. C. and H. of A.** (Wis.), decided in 1936, 268 N. W. 250; **Fenske Bros. v. Upholsterers' Int. Union**, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318; **Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union**, decided in 1934 (Dist. Court, N. J.), 8 Fed. Supp. 209; **Scofes v. Helmar**, 205 Ind. 596, 187 N. E. 662; **Wisconsin State Federation v. Simplex Shoe Mfg. Co.**, 215 Wis. 623, 256 N. W. 56; **Goldfinger v. Feintuch**, decided June 11, 1936, 288 N. Y. S. 855; **Exchange Bakery Co. v. Rifkin**, supra; **Mann v. Raimist**, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669; **Stillwell Theatre v. Kaplan**, 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6.

"It is true that the last three cases above cited did not involve legislation patterned after the federal act, but the reasoning in all of them strongly supports the construction which we have given to the statute in question.

"The statutory definition of a 'labor dispute' (subdivision 3, section 13, chapter 355, Oregon Laws 1933) is broad enough to include any controversy relating to conditions of employment or industrial relations **regardless of whether or not the disputants stand in the proximate relation of employer and employee.**

Notwithstanding the plain and specific language of the statute, it is argued, however, that the above emphasized clause was merely intended to permit a labor union to come to the aid of its members or at the most workmen who are engaged in a labor dispute. In answering this contention the Supreme Court of Wisconsin in **American Furniture Co. v. I. B. of T. C.**, supra, said:

> "'It is the **disputants** who need not stand in the relation of employer and employee. Plaintiff's contention implies that basically the disputants must be the employer and the employees, whereas the act plainly indicates that the disputants, that is to say, the principals to a labor dispute, need not stand in the relation of employer and employee.'

"Under the construction as contended for by plaintiffs a labor union would absolutely be prohibited from protesting against low wages, long hours, or unsanitary conditions of a sweatshop, because, peradventure, non-union employees were 'satisfied' to continue to work under such conditions. Can it reasonably be contended that a labor union has no interest in such industrial relations? Are we to so construe the statute that an organization of workmen united for the purpose of raising the standards of labor must stand idly by and see its cause undermined and defeated merely because there is no immediate dispute between employer and employee?

"In **United Electric Coal Companies v. Rice**, 80 F. (2d) 1, language may be found tending to support the contention of respondents herein, but that case involved a controversy between two labor unions. It was not a controversy over hours, wages, or labor conditions, as in the instant case. Hence it is not applicable. The same may be said in reference to **Lauf v. Shinner & Co.**, 82 F. (2d) 68.

"Defendants also urge that the decision of this

court sitting in banc in **Blumauer v. Portland M. P. M. O. P. Union**, supra, requires a reversal of the decrees enjoining picketing in the instant cases. In the **Blumauer case**, a moving picture business was operated under a lease by G. M. Dunn, Inc. The employer reduced the wages of certain moving picture operators below the wage scale of the union. The employees refused to accept such wage reduction and quit their employment. Non-union operators were secured to carry on the work. The union thereupon picketed the place of business as being 'Unfair to Organized Labor.' The lessee became financially involved and the lessor took over the theatre and continued operation. Picketing continued. Thereupon suit for injunction was instituted.

"In that case, as here, the plaintiff asserted the object and purpose of the picketing was to compel recognition of the union. The defendant labor organization contended that the purpose was 'to make appellants pay the union scale of wages regardless of whom they may hire.' The union, there as here, offered to withdraw the pickets if the employer would comply with the union scale of wages. Chief Justice Campbell, speaking for the court in an opinion from which there was no dissent—the personnel of the court being the same as now exists—said:

> " 'Organized labor has a right to lawfully use all lawful means to bring about reasonably desirable terms and conditions in the way of hours, pay or other conditions of employment. Organized labor has the right to present its side of a controversy to the public by all lawful means if such means may be, and are, used in a lawful manner without violence, or threats, or intimidation of the employer, his employees or the patrons of the employer's business.
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versy, organized labor may exercise by lawful means, in a lawful manner **when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees.'**

"It is true that this decision was rendered a few months prior to the enactment of the statute under consideration and it may well be argued that, in some particulars, it cannot be reconciled with prior decisions of this court. It is, nevertheless, the last expression of this court on the subject of the labor injunction and is supported by reputable authority. **Exchange Bakery Co. v. Rifkin**, supra. Certainly if the **Blumauer** decision was good law at the time it was rendered, it is doubly so now, in view of the public policy of the state as declared in chapter 355, Oregon Laws for 1933. It will be recalled that in the **Blumauer** case no member of the union was an employee of the plaintiff seeking injunctive relief at the time picketing was carried on.

"In our opinion, the statute thus construed is applicable. The defendants have 'direct or indirect' interests in the terms and conditions of employment regardless of whether or not they 'stand in the proximate relation of employer and employee.' By reason of the difference between the standards maintained by the plaintiffs and those fixed by the defendants, a 'labor dispute,' within the meaning of the statute, exists. It is not for this court to say who is right in this industrial controversy. The court is not prepared to say that the standards advocated by the defendant are so unreasonable as to indicate a purpose to injure the plaintiffs rather than to promote the interests of the labor organization. It is a ques-

tion upon which reasonable minds might differ. Under such circumstances the policy of the state, as expressed in the act, is non-interference in this conflict of interests, so long as neither side resorts to unlawful methods in seeking its objective. It may be that the statute, in its application to the plaintiff employers, operates harshly, but the matter rests with the legislature and not with the court."

C.

The Wisconsin Labor Code Does Not Deny to the Appellant or Others the Equal Protection of the Laws Within the Meaning of the Fourteenth Amendment of the Constitution of the United States.

While this problem of the equal protection of the laws is almost inextricably tied up with the question of due process of law, we treat it separately, since the appellant has seen fit to do so. The cases already cited and discussed deal with this problem along with the other problems in the case. The case of **Truax v. Corrigan**, which is so greatly relied upon by the appellant, we have already discussed and explained. It is clear that it has no application here. We must also point out in this connection that the appellant calls into question other provisions of the Labor Code to demonstrate this point. While we believe that this argument cannot be sustained on any point, we reiterate that those parts of the Labor Code are not now here pertinent nor are they provisions which the Court now has before it for its review.

We believe that the decision of the Court in the case of **Texas & N. O. Railroad Company v. Brotherhood of Railway Clerks**, supra, has determined this question in so far as legislation concerning disputes arising out of con-

troversies between employers and employees is concerned.

It is not "class legislation" for a legislature to enact laws having particular and specific application only to the class of persons who labor with their hands. From time immemorial, both in old England and in this country, the working class of people have been treated separately. From a time preceding the Magna Charta, where the expressions "due process of law" and "equal protection of the laws" got their first articulate enunciation, people who work with their hands have been treated as a separate class, both from the standpoint of restrictive legislation and from the standpoint of what at first blush appears to be legislating special privileges. For the last one hundred years, both in this country and in England, the legislatures have been enacting laws affecting the laboring class, specifically and exclusively. As stated recently in the New York case of **Kronowitz v. Schlansky**, 282 N. Y. S. 564, a case involving the validity of a statute granting a jury trial in contempt proceedings arising out of labor disputes:

> "It is urged, finally, that the statute considered is unconstitutional as special class legislation which denies the plaintiff equal protection of the laws. As was said in People v. Beakes Dairy Co. (222 N. Y. 416, 429), 'There is no constitutional prohibition against class legislation as such if the classification is based on some reasonable ground, and is not essentially arbitrary. The statutes are replete with instances where the legislature has selected a class of persons for regulation. It is only where there is no real distinction on a substantial basis that it can be said that the equal protection of the laws is denied.'
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> "**The social and economic forces underlying labor**

disputes with its resulting wide public interest, the plethora of legal research on the subject, the declaration of various legislatures, including the Congress of the United States and the legislature of this state, that there are abuses to be met in the existing procedure applicable to labor disputes, all negative any possible inference that legislation limited in its application to labor disputes is arbitrary, oppressive or capricious are based upon no real distinction." (Emphasis ours.)

The following are a few examples of legislation affecting only laboring people that have been upheld against the contention of "class legislation": In **Holden v. Hardy**, 169 U. S. 366, a state statute was upheld limiting the hours of employment in mines and smelters; in **Knoxville etc. Co. v. Harbison**, 183 U. S. 13, a statute requiring redemption in cash of store orders or other evidences of indebtedness, issued in payment of wages, was held constitutional; in **Patterson v. Bark Eudora**, 190 U. S. 169, a Congressional statute forbidding advance payment to seamen was upheld; in **McLean v. Arkansas**, 211 U. S. 539, the prohibition of contractors to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine was held constitutional; in **Bunting v. Oregon**, 243 U. S. 426, a statute limiting the hours of employment in a manufacturing establishment with a specified allowance for overtime payment was upheld. In addition to the examples cited, we have such familiar examples as the employers' liability acts, workmen's compensation laws and the seamen's act of 1920, all of which have been upheld against the argument of unconstitutionality on the ground of "class legislation." It is not necessary here to inquire into the differences between the old Clayton Act and the present Norris-La Guardia Act. Suffice it to say that every decision, in-

cluding the decisions of this Court, upholding the constitutionality of the older act, are authorities directly in point for the proposition that anti-injunction legislation in labor disputes is not unconstitutional as denying to the employers or others the equal protection of the laws. (See **Greenfield v. Central Labor Council**, 104 Or. 236.)

Before closing this discussion we should like to refer briefly to the opinions of the Justices of the New Hampshire and Massachusetts courts, which are cited by the appellant in his brief at pages 38 and 39. Those decisions were advisory opinions only and no briefs or arguments were before the Court. They did not have the effect of *stare decisis*. In any event, neither case holds every provision of the Norris-La Guardia Act as state legislation unconstitutional, but only that in the opinion of the Justices certain provisions thereof were bad. **Neither case dealt with the sections of the Act particularly applicable to the facts of this case.** For example, the Massachusetts Court held the Act unconstitutional largely because of the provision with regard to "yellow dog" contracts on the authority of the **Adair** and **Coppage cases.** Both cases relied to a great extent upon the doctrine of inherent power of the courts, which is not applicable in the instant case, as already pointed out. It is also interesting to note that in 1935 Massachusetts passed the Norris-La Guardia Act, leaving out only the "yellow dog" contract provision (see Massachusetts Laws 1935, chapter 407), thus demonstrating that the Legislature of Massachusetts did not consider that advisory opinion as holding unconstitutional the provisions of the Act applicable in the case now before the Court.

III.

THE WISCONSIN LABOR CODE, IN SO FAR AS IT AFFECTS THE ISSUES IN THIS CASE, DOES NOT CHANGE THE LAW RELATING TO LABOR DISPUTES, WHICH LAW WAS IN EXISTENCE PRIOR TO THE ENACTMENT, AND THE LAW PRIOR TO ITS ENACTMENT WAS THE SAME AS IT WAS HELD TO BE IN THE INSTANT CASE BY THE WISCONSIN SUPREME COURT.

We do not wish to unduly burden this Court with an extended discussion of cases dealing with the rights of working men to organize and to pursue peacefully the objects for which they organized. That subject is taken up to a considerable degree under point I of this brief. We do, however, wish to point out to the Court that not only was the statutory enactment of the Wisconsin Labor Code a legitimate exercise of the police power of the State Legislature in its recognition of fundamental concepts relating to the relationship of employer and employee, but also that this enactment was a recognition of such rights and privileges on behalf of working men as existed prior to the enactment of the statute. More specifically we direct the Court's attention to those cases which arrived at the same conclusion as the Wisconsin Supreme Court did in the instant case concerning a dispute between employers and organizations composed of employees engaged in the same trade, craft or industry. The cases of **Exchange Bakeries v. Rifkin**, supra, and **Clark Lunch Company v. Local 106**, supra, dealing with this point, have already been discussed in this brief, as has been the case of **American Steel Foundries Company v. Tri-City Central Trades Council**. In addition to those cases, we cite the case of **United**

Chain Theatres Company v. Philadelphia M. P. M. O. Union (Pa.), 50 Fed. (2d) 189, wherein the Court was called upon to deal with the same situation, that is, picketing plaintiff's place of business by union men who were not employees of that employer. In refusing to restrain such picketing by the issuance of an injunction, the Federal Court said:

"• • • A man's business is, generally speaking, entitled to the same protection by law as any other kind of property; but where injury to business occurs or is threatened in the course of one of the conflicts generally accepted as necessarily incident to economic and social progress, the law may, under certain circumstances, permit the injury and withhold the remedy. Whether it will or not depends ultimately upon public policy, but the method of determining each particular case usually takes the form of an inquiry **whether the acts causing or threatening the injury are for a justifiable purpose.**

"Where the conflict is between employee and employers, self-interest is generally accepted by the law as a justification for acts by employees, injurious to the employer's business."

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"In the case at hand, however, these defendants are directly and immediately interested in employment at the plaintiff's theaters; they want the jobs for their own members, and they want them at the wages and under the restrictions established by the regular union contract which is in force in most of the theaters in Philadelphia. It is quite true that the important effort here is to unionize the plaintiff's business, but more than in the ordinary case, **this is only an intermediate step in obtaining what is really desired, namely, employment for union men at union wages, and on union terms. While no member of the defend-**

ant union is now actually seeking employment in the plaintiff's theaters, some of them have been employed there, and **each one of them is a potential employee.** Thus the union has much more than a remote interest in the plaintiff's relations with employers."

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"The conclusion that the defendant's course of conduct was justified by its purpose means simply that the bare fact of injury to the plaintiff's business, caused incidentally by the defendants, will not, under the circumstances of this case, entitle the plaintiff to relief. It still remains to consider the means adopted by the defendants."

Likewise, in the case of **Blumauer v. Local Union No. 159,** 141 Ore. 399, a case where no dispute existed between the employer and his immediate employees, the Court upheld the right of union to picket the employer's place of business, and the following rule was announced:

"This right of presenting its side of the controversy, organized labor may exercise by lawful means in a lawful manner when its members have reasonable ground to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there be no direct controversy between the employer and his immediate employees."

See, also **Great Northern Railway Company v. Brossaue,** 286 Fed. 414, and **Bayonne Textile Corporation v. American Federation of Soap Workers,** 116 N. J. Eq. 146, 176 Atl. 551.

It can thus be seen that the code in legalizing certain acts under certain circumstances merely follows what was

considered the best law always. It is a full recognition of the rights of working men and the controversies which arise between them and employers which are peculiar to these particular groups and which are so unalterably tied up with the peace, welfare and morals of society that the courts and the Legislatures have developed a special technique in dealing with such legislation.

The point we herein make is also pertinent on the question of jurisdiction. It was not necessary to a determination of the issues in the instant case for the Court to refer to the Wisconsin Labor Code for guidance. This decision of the Court is not based entirely upon the code, but rather it is based upon the common law as it existed prior to the code. Referring to the decision, it can be seen that there is no reference made to the Wisconsin Labor Code, except as such reference might be considered to be made inferentially in the references made to the American Furniture Company case.

IV.

DISCUSSION OF THE DISSENTING OPINION BY MR. JUSTICE FOWLER IN THE INSTANT CASE.

The appellant has placed great reliance on the dissenting opinion of Mr. Justice Fowler.

Counsel for the respondents has a very high regard for the dissenting opinions of courts of last resort. These dissenting opinions are valuable in that whenever in the future it becomes necessary to deal with controversies similar to those already adjudicated, such opinions enable one to fully appreciate the particular problem which was at that time discussed, and by comparing the majority and minority opinions, enable one to approach the question taking into full consideration the varying analyses that

have been made of such problems. This is certainly true in cases dealing with socio-economic problems.

Because appellant bases his position to quite a degree on the dissent we are impelled to discuss quite freely the minority opinion of Mr. Justice Fowler.

The minority opinion points out that if the appellant cannot do business as a contractor under the proposed contract and thereby gives up his business as a contractor "his opportunity to work at his trade as a layer of tile would be diminished and destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer." Surely that does not render the conduct of the respondents illegal. They are in no manner obliged to guarantee him the right to do business as a contractor upon terms and conditions that he can fulfill. Even the state is not obliged to do that. Thousands of persons would like to go into business, but for some reason or other, through lack of capital, the high cost of material, the high cost of labor, the inability to compete with union shops, etc., they are prevented from going into the business of contractor or successfully continuing in the business. Is the situation any different than if appellant were unable to pay the wages set forth in the contract and therefore had to go out of business? The fact that he has to go out of business or is unable to continue in it as a union contractor has nothing to do with his ability or inability to join a union or with the apprenticeship feature. If he seeks an opportunity to work at the trade he must face that proposition, and the opportunity and lack of opportunity, in the same manner as any other person faces it who desires to work as a tile layer. There is nothing to prevent him finding employment as a nonunion tile layer if he prefers to work in that capacity; and if he cannot find

work certainly the respondents are not responsible for that any more than they are responsible for the inability of their own members to find work. The testimony shows that there are many of them without work and on relief.

If he wishes to work as a union tile layer he is obliged to fulfill the rules prescribed by the union for those who are members and those who seek membership in the union. If a union member is required to serve an apprenticeship before he attains the status of journeyman, appellant is obliged to serve the apprenticeship before he secures that status.

But when the minority opinion launches off into the personal view that "it is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile" it exhibits a total failure to recognize the deep and intense social and economic implications involved in the apprenticeship requirement.

The characterization of this requirement as "nonsense" and "unreasonable" is an assumption on the part of the minority that they know better how the industry should be regulated than those in the industry. It seems to us that after years of negotiations between union workers and union employers, and the fixing of terms and conditions best suited to the industry, it is not the province nor function of courts to tell the industry what rules are best suited for it. We think the courts should leave the determination of these terms and conditions to those who are best informed and most able to do it, since there is nothing on the face of the requirement that one serve an apprenticeship before he is given the status of journeyman that is unusual or so outlandish as to shock one's conscience.

In fact, the three-year term of apprenticeship in any of the skilled crafts in the building trades has been a requirement for over half a century. Those who know some-

thing of the apprenticeship history know that there is more than the element of acquisition of skill in the apprenticeship rule. In fact, it is so vast and so all-important that one could very well spend fifty or more pages in an explanation of the subject.

The regulation of apprenticeship goes to the very heart of the regulation of employment, and often gives rise to considerable controversy between employer and employees. Every craftsman is desirous of maintaining his standard of wages. Every craftsman knows that a fair standard of wages can only be maintained in the event the craft is not flooded or over-supplied with workers. Every one knows that there should be some regulation of supply and demand for craftsmen in the industry. The apprenticeship rule is one of the most potent factors in regulating this feature of employment, and conserving standards of wages.

Several years ago this writer was counsel in a bitter labor controversy in Wisconsin. A large hosiery concern had decided that it would install new machinery requiring but one knitter to operate two machines at the same time, whereas each knitter formerly operated one. In order to facilitate the knitter in his operation of the two machines he was to be given two apprentices, thus making three persons—a skilled knitter and two apprentices to each machine. It was apparent to the knitters that before long the two apprentices would be full-fledged knitters; that there would be an over-supply of skilled labor, and that the wages of the knitters would be greatly reduced. The knitters went on strike, and it was an intense and bitter struggle to prevent the installation of the rule requiring a knitter to attend to two machines with the aid of two apprentices.

If before declaring the apprenticeship rule to be "nonsense" and "unreasonable" an examination of labor his-

tory were made, we doubt whether the minority would, with that curt wave of the hand, so characterize the rule with such assurance and certainty.

One of the greatest controversies in all history of labor centered around the apprenticeship rule. As far back as Queen Elizabeth's time Parliament passed regulatory apprenticeship laws to regulate the supply of labor and to maintain living wage standards. Webb, on the "History of Trade Unionism" (p. 42 and ff.), published by Longmans, Green and Co., in 1911, records the facts:

> "• • • But by the celebrated 'Statute of Apprentices' the statesmen of the time contrived arrangements which would, as they hoped, 'yield unto the hired person, both in the time of scarcity and in the time of plenty, a convenient proportion of wages.' Every year the justices of each locality were to meet, 'and calling unto them such discrete and grave persons • • • as they shall think meet, and conferring together respecting the plenty or scarcity of the time,' were to fix the wages of practically every kind of labour, their decisions being enforceable by heavy penalties. Stringent regulations as to the necessity of apprenticeship, the length of its term, and the number of apprentices to be taken by each employer, received the confirmation of law. The typical ordinances of the medieval gild were, in fact, enacted in minute detail in a comprehensive general statute applying to the greater part of the industry of the period (p. 42).
>
> "• • • We gather from the employers' complaints that the main preoccupation of the federation was the strict enforcement of the law limiting the number of apprentices which each master might take. This caused the leading master hatters to promote, in 1777, a bill to remove the limitation. Against them was marshaled the whole strength of the journeymen's organization • • •" (p. 46).

Then follows a historical review of apprenticeship laws, and this significant paragraph:

"• • • The original 'case' which the journeymen curriers submitted to counsel in 1810 (fee two guineas), with a view to putting in force the Statute of Apprentices, is in our possession, together with the somewhat hesitating opinion of the legal adviser. **In a few cases proceedings were even taken against employers for having set up in trades to which they had not themselves served their time.** • • • There was nothing for it then but either to abandon the line of attack or to petition Parliament to make effective the still unrepealed laws. This they accordingly did, with the unexpected result that the 'pernicious' law empowering justices to fix wages was in 1813 peremptorily repealed. (Emphasis ours.) (Page 53.)

"• • • The repeal of the wages' clauses of the statute made this emphatic declaration of the new doctrine law as far as the fixing of wages was concerned; but there remained the apprenticeship clauses. Petitions for the enforcement of these, and their extension to the new trades, kept pouring in • • • (page 54).

"• • • The 'Masters and Journeymen of Westminster' were heard by counsel against this measure, but the House had made up its mind in favour of the manufacturers, and by the Act of 54 Geo. III, c. 96, swept away the apprenticeship clauses of the statute, and with them practically the last remnant of that legislative protection of the Standard of Life which survived from the Middle Ages. The triumphant manufacturers presented Serjeant Onslow with several pieces of plate for his championship of commercial liberty" (page 55).

This commences with 1688. The history indicates that throughout the years until the present day the subject

of the regulation of apprenticeship has been a matter of great importance with guilds, trade unions and Parliamentary bodies. Just as the English Justices made a bad mess of the subject of regulating apprenticeship we most respectfully urge that our Wisconsin Justices would have made an equally bad mess if they had endeavored to regulate the apprenticeship rule by their own ideas of what is sense and reasonable.

The minority opinion then proceeds to discuss the constitutional question and asserts, "I wish to say further that in the instant case, however it may be in the **American Furniture Co.** case, supra, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law." This subject has been quite fully discussed in the briefs of the parties to this case, and discussed and adjudicated in the majority opinion. If the picketing is illegal in the case at bar because it deprives the appellant of liberty and property without due process of law, it is illegal in the **American Furniture Company** case and illegal in every case of a labor dispute. The majority opinion points out that here is a lawful labor dispute, though recognizing that injury is inflicted upon appellant, consequently "the injury resulting to the plaintiff from it (picketing) is effected through due process of law." Applying the quoted language of the various cases referred to in the minority opinion, it would prohibit all picketing as illegal when it interfered with the rights of any worker to follow his employment, even when the picketing was in furtherance of a strike. Thus an employee satisfied with his wages and desiring to work for the employer at low wages, even though fellow employees are on strike for higher wages, would be in a position to restrain picketing as an unlawful interference with his absolute right to work at whatever wages he is satis-

fied to work for. We are aware that there are decisions to that effect, but they are based on the definite position that all picketing under any circumstances is illegal. We shall, in a subsequent portion of this discussion, point out that the minority opinion inferentially subscribes to that doctrine, a doctrine overwhelmingly opposed and repudiated by the large majority of courts in the country, and expressly repudiated by both the Clayton Act and the Labor Code.

The minority opinion proceeds to analyze the economic situation of the appellant and his status in society, and then we are told that he cannot make a living laying tile as a journeyman without membership in the respondent union, and that is denied him because he has not served three years as an apprentice tile layer; that if the picketing continues he will not be able to earn a living, his business may be destroyed "with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition * * *."

That is a definite analysis of the economic situation of appellant, and we agree that it is correct. **But fortunate or unfortunate as the situation is to appellant it does not create legal rights in him which would abrogate the legal rights the law accords respondents.** The exercise of his rights may drive them to the condition he claims he does not want to be driven to. We are rather struck by this energetic appeal, not because of the legal principles urged, but because of its social implications. What strikes us is that the courts do not find constitutional inhibitions when practices leading to similar results are indulged in by employers. It is commonly known that there exists as a policy in hundreds of plants in this state and in the coun-

try that persons beyond 45 years of age will not be employed. Read any edition of the "want ad" column of a metropolitan newspaper, particularly the Sunday edition. We know of no decision ever advanced that these employers have not the right to carry out that policy though hundreds of men are thereby denied employment, their labor power effectively destroyed, they are thrown onto relief and society is burdened with their care. We know, too, that through technological changes in industry the same result is accomplished. As testified to before the United States Senate Committee on Education and Labor in 1929:

> "Seven men now do the work which formerly required sixty to perform in casting pig iron; two men now do the work which formerly required 128 in loading pig iron; one man replaces forty-two in operating open-hearth furnaces. A brick-making machine in Chicago makes 40,000 bricks per hour; it formerly took one man eight hours to make 450. The most up-to-date bottle making machine makes in one hour what forty-one workers used to make by hand in the manufacture of four-ounce prescription bottles."

And this is true in every trade or industry. The employers seek the adoption of machinery as labor-saving devices so that more might be produced at less cost, and this by employers who are interested in showing stock dividends first instead of a large number of employees on the pay roll.

The foregoing policy on the part of American employers is well described in an editorial we have before us in the April, 1930, issue of Forbes, a business men's magazine:

> "Business is business. The objective of industry is to make money. We concentrate solely on that aim.

If we are satisfied that a billion-dollar merger will mean greater profits, we go ahead and engineer it.

"One of the easiest ways to cut down expenses being to cut down salary and wage rolls, we of course lay men off right and left. If elderly workers have become less nimble because of their long years of service, they are the logical ones to be dropped first. Naturally, the greater resources at the command of the enlarged combinations are unstintedly used to acquire the very latest labor-saving machinery, enabling us to dismiss still more wage earners.

"In our eyes the most valuable executive is the one who can produce the most with the least amount of labor—the smallest number of workers and the smallest pay roll. Our up-to-the-minute methods make it feasible for us to dispense with enormous numbers of workers—it is not uncommon for us to install one machine which enables half a dozen men to do what formerly took half a hundred or even a hundred men.

"Yes, we know that through our creation of gigantic enterprises—manufacturing, distributing, retailing, and every other kind—and through our vast expenditures on research, on invention, on machinery, we have caused grave dislocation of employment; but instead of being criticized for all this technological unemployment, we should be commended, since it is conclusive proof of our mastery of the science of management. What happens to all the hordes of workers we release is not our concern. Our responsibility begins and ends with running our business with surpassing efficiency, which means with a minimum of human labor.

"No, the unemployment thus created does not enter in any way into our calculations. Our bounden duty is to exercise every ounce of ingenuity we possess to do away with jobs, not to create them. Our objective is money, more and more money, not more and more men, but fewer and fewer men.

"We are much too engrossed in increasing profits to give a thought to what happens because of our

reducing the number of workers. How to take care of unemployment is a problem for others to solve. Let George do that. • • • We haven't the time to bother with it. It isn't our worry."

Is there any law that holds it unconstitutional for an employer to move his business from one state to another because he does not wish to meet improved standards in employment relations? In the City of Beaver Dam, Wisconsin, an employer closed down his plant and threw several hundred persons out of employment because a number of his employees wanted the same working conditions as prevailed in other plants in the industry in the state. Yes, nowhere can we find any legal protection for the men who were thus thrown out of employment.

In the City of Milwaukee a number of shoe manufacturing concerns moved out of the city to smaller communities where they could get cheap labor and at standards much lower than those which prevailed in Milwaukee. Hundreds were thrown out of employment, yet we know of no law that protected these workers in the destruction of their employment. We know of no judicial pronouncement that would protect these employees under "the sacred right to labor."

We ask, has any court said that this method of doing business is unconstitutional because hundreds of men are thrown out of employment and onto relief? Has any court said that this mass production by new devices displacing man power, curtailing wages and thereby the ability to purchase, leading to an economic breakdown, is illegal? We have searched in vain for a decision that has held these practices, throwing men out of jobs, destroying their earning power by employers, to be unconstitutional, and yet we find in the minority decision an economic analysis as the basis for holding the conduct of respondents un-

constitutional, although **all the respondents are trying to do is to preserve for themselves in this era of competition a decent livelihood, and the continuation of their jobs. The appellant's methods are as destructive of their livelihood as he claims theirs are of his. And in this economic struggle the Legislature has said their methods are as lawful as his.**

The minority opinion goes on to say that "* * * it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors * * *." We reply that it is perfectly lawful for the respondents to apply these restrictions, even though they result in preventing journeymen tile layers from fulfilling their aspirations of becoming contractors if they aspire to do so as nonunion contractors, bidding on contracts at low wages and long hours, working in competition with their journeymen employees, if doing business on that basis is harmful to the living standard of respondents.

The concluding plea is that the conduct of the respondents will be attended "with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union." We have yet to have pointed out to us a case where a union having succeeded in completely organizing an industry upon fair wage standards and working conditions, that this has been held to be an unlawful monopoly in restraint of trade. If this were unlawful monopoly, then a union's efforts to secure complete unionization by any means, even the mere acceptance as members of all workers in the craft, would be illegal. On the monopoly theory any efforts in furtherance of complete unionization would be illegal. The law never intended that unions shall abstain from their efforts at securing fair wages and standard working condi-

tions by endeavoring to unionize an entire industry simply because some contractors would have to go out of business because of their inability to meet the prescribed union standards. It is true that many businesses, such as tile laying, ordinarily start with small beginnings, and if successful gradually extend to more considerable proportions, but this does not provide a legal guarantee that the small contractors can flood the marke in a cut-throat, wild-cat, competitive effort to work up to considerable proportions if in doing so they must trample under foot those who have attained decent business standards and whose workers are secured with fair living conditions. There is no guarantee that his path shall not be blocked if it is a path of low wages, long hours, competition by the contractor with journeymen, etc.

The trend of the law is all the other way. Fair practices in business is the order of the day. We have adopted a law fixing the price to be paid for milk and the price for which milk may be sold, and these enactments have been held not to be invalid.

In the main portion of this brief we have discussed the **Roraback, Hughes, Parker Paint and Wall Paper Company** cases, and shown that the cases are inapplicable, and that they are decisions prior to the code which extends the scope of what was formerly labor disputes.

The astounding declaration that by virtue of being picketed "the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat 'to beat him up' every time he took a contract for tiling" is a reversion to a doctrine that we had thought has long since been buried. How can the dissenting opinion liken peaceful picketing to physical violence? Can it

be that the minority opinion does not see any distinction between a peaceful picket line and physical violence? **Picketing involves an appeal to the public and to workers, violence is not appeal.** Is it possible that the legislative declaration on this subject is no guide as to its lawfulness? The holding that peaceful picketing is equivalent to beating up the employer must be judged on the basis of picketing as **picketing** and not by applying it to the particular dispute. We readily concede that if there is no labor dispute peaceful picketing should be enjoined, not because it is equivalent to physical violence, but because it works an injury upon another without legal cause. But the fact that there is legal cause and there is a lawful labor dispute does not change the character of the act of picketing. If the picket line is equivalent to violence it is so then in a lawful strike, and thus the minority opinion aligns itself with those discredited decisions which prohibit all picketing on the basis that it is illegal. It subscribes to that doctrine so clearly enunciated in the case of **Atchison T. S. F. Ry. Co. v. Gee et al.**, 139 Fed. 582 (1905), "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching."

And may we say parenthetically that we find no expression in the dissenting opinion which infers that picketing is lawful under any circumstances, not even in the instance of a strike. We find the rather guarded reservation in the following expression: "As to peaceful picketing declared lawful by the Code, whether or not it may be declared lawful in furtherance of a strike of employees * * *." We do not believe that the statement, "No court has ever yet squarely held that picketing, peaceful or otherwise, is lawful except in aid of a strike" is the fact. If we did not wish to burden this brief with numbers of citations run-

ning over many years we would set forth excerpts from a number of them. Courts such as the California courts hold the secondary boycott to be legal and to permit picketing in aid of a boycott though no strike existed at the establishment picketed. A lockout is not a strike; it is a labor controversy, and the volumes of law contain dozens of cases to the effect that picketing in opposition to a lockout is legal. But one need go no further than the case referred to by the minority opinion. **Exchange Bakery and Restaurant Co. v. Rifkin, 245 N. Y. 260.** The Court says this case "does hold, in effect, that peaceful picketing in aid of a strike is lawful." This case holds with equal force and just as squarely that peaceful picketing not in aid of a strike is lawful: **"Picketing without a strike is no more unlawful than a strike without picketing."** We don't know what language can be used to hold more squarely the proposition the minority opinion says no court has held. See also **Nann v. Raimist,** 255 N. Y. 307, 147 N. E. 690, and **Wise Shoe Co., Inc., v. Retail Shoe Salesmen's Union,** 266 N. Y. 264, neither of which are strike cases.

The minority opinion asserts "that peaceful picketing is not made lawful in every controversy growing out of a labor dispute by the declaration of the code may, we think, be clearly shown by a few hypothetical cases."

Whether the above is a correct statement of law, the hypothetical cases certainly do not support or prove the foregoing contention. The illustration of the WPA strike is a forceful example of a real labor dispute within the code entitling those engaged in it to exert economic pressure in furtherance of it. The workers of the WPA are on strike for an increased wage. There is nothing in the law which prohibits that. They come to the capitol city in a "great horde." If they come peacefully and comport themselves orderly they have a right to come in great num-

bers whether they are called a "horde" or a group of striking workers. Their demand of the state administrator that he increase their wages is not a demand upon him to grant the increase out of his personal funds. Even workers understand that their appeal to him must be relayed to others; but they also understand that the Government is made up of numbers of officials; that he, as administrator, is directly in charge over them; that in appealing to him they are appealing to the particular officer of the Government designated to have contact with them; that in picketing him they are picketing their employer, and that he in turn will make known their appeal, their petition, their economic persuasion in furtherance of it, so that they may gain their increase in wages.

Just what difference is there in picketing a WPA administrator because he personally cannot comply with the wage demands with the workers than there is in picketing the manager's office of an A. & P. store, who likewise cannot grant a demand of employees for increased wages, but must secure the authority from other executives in New York or elsewhere?

The illustration points out that they make a like demand upon the Governor, and he, too, "is powerless to meet their demand." In the case of the Governor the facts should indicate whether he stands in the relationship to the workers of administering the department to which they are attached and whether he has any control over the workers whatsoever. It may well be that the Governor has no more official connection with the WPA than has an alderman. It may also be, as was the fact in Wisconsin in 1931 and 1932, when the building of overhead viaducts and bridges was in progress, that the Governor was empowered to fix the rate of pay for workers in that employment. If the Governor is in this position he then is in the same posi-

tion as the administrator of the WPA. We contend that by every test of what constitutes a labor dispute under the circumstances outlined, there exists here a labor dispute with the right to picket in furtherance of it.

Courts have time and again restrained pickets engaged in a lawful labor dispute from blocking entrances of private concerns. We concede that pickets would have no right to enter the business offices of a picketed concern, or the factory of such business, or the store premises of a storekeeper with whom they are in dispute, and carry on their picketing inside the establishment. But suppose the pickets carried their truthful signs respecting the Governor outside of the capitol building on the public sidewalks, orderly, peaceful, not blocking the sidewalks, permitting all persons egress and ingress to the capitol building, we emphatically contend that such picketing is lawful in furtherance of their labor dispute.

We have treated the foregoing in the light of the Court's question and confined it to the matter of a labor dispute. But something else occurs to us in connection with the right to picket the WPA administrator and the Governor, and that is the Constitution of the state, Article I, Section 4: "**Peaceable assembly and petition.** The right of the people peaceably to assemble, to consult for the common good, and to petition the Government **or any department thereof** shall never be abridged."

We rather think that the conduct described in the minority opinion under the circumstances would come within the rights of the aggrieved workers under the above-quoted provision of the Constitution. Their picketing is a form of peaceable assemblage and a form of petitioning the Government and its department, the WPA. Petitioning the Government is not necessarily required to be done upon rolls of parchment or paper. We do not know

why the carrying of a sign with a truthful statement on it is not a proper petition. It may be a more effective one than paper ones, but we know of no reason which requires that the petition shall not be in the most effective form possible, if peaceful.

But when we come to the illustration of the case of Mrs. Blank, we most respectfully assert that it is not warranted by any conception of law with or without the code. The minority opinion concedes there is a labor dispute. That being so, it affords the strongest and most classical example of the right to picket in furtherance of it. We are somewhat shocked at the social implications contained in the proposition rather than the holding that picketing in furtherance of it is not lawful.

The minority opinion holds that it is illegal to subject Mrs. Blank and her husband to the "annoyance and nuisance" of peaceful picketing if she wants to pay and can only pay $3.00 a week to a domestic and the domestic is willing to work for such sum. If Mrs. Blank's inability to pay more, and the desire of the domestic to render the service for the wage offered is the criterion upon which the legality or illegality is to be determined, then why not apply the same test to the small storekeeper, to the small factory owner, and even to the larger one? Why shouldn't Mr. Ford be permitted to pay his workers $3.00 a week if that is all he can pay?

Suppose Mrs. Blank is not the poor woman described in the illustration, but is the wife of a lawyer with an income of many thousands of dollars per year; that she desires help and because of the necessitous circumstances of maids seeking employment is able to secure service at $3 per week. Is she still to be free from the annoyance of picketing? But let us take the facts as given, that is,

that Mrs. Blank cannot really pay more. Is Mrs. Blank the only one to be considered? What about the maid? Is she to have no consideration? Is society or an interested union of maids to be bound by the willingness of Mrs. Blank's maid to work for $3 a week to be restrained from protest by lawful picketing? "Satisfaction" of the maid under such circumstances is not the test. The maid is a human being, wants a few of the fineries and things that the lawyer's daughter wants and has. She, too, would like to attend a movie. She, too, would like to sit down at an ice cream counter and buy a soda. She, too, may be subjected to an illness or operation and would prefer not to have it performed in a charitable institution. She, too, may come from a family of a hard-working mother with many children whose circumstances are such as to compel her to leave the home in order to reduce the number of mouths to feed, and perhaps requires her to contribute a portion of her earnings to the home, although heaven knows how she would be able to do so on $3 a week.

The circumstances which make for her willingness and desire to work for $3 a week are not the test. And let me say, it is a matter of common knowledge and actual fact that in the cities there are thousands of Mrs. Blanks employing maids at wages which are a disgrace to society, and this by persons who are able to pay far more than is being paid. It is not a problem of one maid, but of the welfare of thousands of maids.

But labor believes that the consideration of the maid comes before a consideration of Mrs. Blank. The illustration propounded implies that Mrs. Blank is to be considered first. We do not deny that as a personal proposition citizens are entitled to these views. But so is labor

entitled to the opposite view, and the Legislature has the right to settle the question for the public welfare.

The $3 idea is parallel with the present trouble in Arkansas, where the share-croppers protested against a wage of 75 cents per day. The workers organized a union to secure an increased wage; the employers, with the aid of the police, tarred and feathered the organizers, after which they declared they are now free from trouble and have the workers in the situation of begging for jobs at that rate.

The social philosophy of the minority opinion is in conflict with modern social concepts. It is suitable to the days of the simple tool, but not to present industry, with its complex machine and mass production. A new America has arisen. Even the economics of unionism are being forced to change. The craft is considered by a good many as antiquated and industrial unionism is fostered. We must make progress and "no Canute can stay it."

Mr. Chief Justice Rosenberry, of the Wisconsin Supreme Court, in his article, "Law and the Changing Order," printed in the September, 1924, issue of the North American Review, clearly states the social and economic factors which should govern the social concepts arising out of the implications of the illustration contained in the minority opinion:

> "• • • While many of the leaders of political and social thought have quite clearly recognized the fundamental character of the trend of our time, it is only dimly apprehended by the great mass of our people. It may be said without disparagement that some of those whose apprehensions are quite dim, occasionally find their way into legislative bodies and into public offices. There they endeavor to force a complex industrial society into the legal and social traditions

applicable to a rural agricultural society. To be wholly frank, it must also be said that many industrial managers have not yet realized the change in relationship and still regard their business as having no other than a private significance.

• • • • • • •

"It cannot be truthfully said that all lawyers, or even all judges, have perceived the fundamental nature of our problems and guided themselves accordingly. The social trend of our time is fundamental rather than superficial. We are, so to speak, turning a corner in social development. We are in the process of passing from one great tradition into another. We are endeavoring to adjust the political and social concepts of an age predominantly rural and agricultural to one which is predominantly industrial and commercial. Human relationships have been vitally altered in many ways. If industrial society is to continue on its present basis, those who have gone out of the home into the factory must there have the safeguards, the guidance and the fair share of the proceeds of industry which they formerly enjoyed as members of a small economic unit, because no form of society can long exist which does not do substantial justice to its members.

• • • • • • •

"• • • It is charged, and not without reason, that courts have in certain instances declared laws unconstitutional because they contravened the social and legal concepts of the judges rather than constitutional principles."

This argument of the minority converted into the doctrine it implies is nothing more or less than the doctrine of laissez faire. This doctrine of let things alone, while

it made the industrialists of the era during which it flourished fabulously rich and is the basis of many present individual fortunes in England and in this country, also contributed to prolonged years of misery for the great mass of industrial workers. If one wishes to inform himself of the effects of this doctrine he should read **Industry in England**, by H. de B. Gibbens (**Scribners**, Vol. VI, p. 224). There, too, the industrialist claimed inability to pay more for his labor. There were many children who had to be put to work in order to secure sustenance. They were put to work at little or no wages. Children as young as six years of age were employed in pin factories twelve and fourteen hours per day. They slept in relays, one set of children got out of bed and another set crawled into them before the beds were even cool.

No, it is not the practice upheld by the majority of the court that is "un-American, oppressive and intolerable," but, rather, the doctrine expounded by the minority. We had thought that "laissez faire" was condemned as un-American by most enlightened persons in the land.

We are told by the minority opinion that "statutory provisions restricting liberty and property of a citizen must be reasonable or they violate due process. They must bear a relation to the health, safety, good order or welfare of the public," and it is pointed out that the statute declaring peaceful picketing bears no relation to any of the foregoing. In response to this we can only say that a statute declaring peaceful picketing lawful, when in furtherance of the public policy set forth in the preamble, bears a direct relation to and promotes the welfare of the public. The intimate connection between the welfare of workers and the welfare of the public is enunciated in the **Simplex** case, *Supra 13.*

Labor does not contend that "peaceful picketing in every case is lawful." It contends that it has the right by statute to peacefully picket in furtherance of what the statute declares to be a legitimate labor dispute. As to the question whether a statute affecting one class of society to the detriment of another overbalances the disadvantage to the other, so that the welfare of the public as a whole is thereby advanced, we must leave that determination to the Legislature unless on its face the "balance" plainly contravenes the Constitution.

The practice upheld by the majority is to carry out the mandate of the Legislature which tends to discourage the process of bargaining between the employer and the individual, unorganized worker. The Code states that "In dealing with such employers, the individual unorganized worker is helpless to exercise **actual** liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment." The Legislature intended to bring about an improvement in working conditions. It proclaims that through the organization of strong independent groups of wage earners decent wage levels may be secured; sweat shops will be abolished; the competition of cheap labor will be eliminated and better living standards secured. We cannot perceive how a law seeking to prevent unbridled competition in the performance of work and labor (which tends to bring down the standard of living conditions for workers) is un-American, oppressive and intolerable.

We appreciate that we have indulged in a long discussion of the dissenting opinion, but it seemed to us that this opinion, considering as it does economic and social implications in addition to law, with a number of forceful expressions of personal views, necessitated making response.

There are numerous decisions of courts throughout the land giving conservative and narrow construction to legislative enactments in favor of labor. May this not be due to a lack of understanding of the purpose of labor unions and labor unionism? We say this because, in a number of these cases, justices who have handed down decisions invalidating labor enactments did so with the statement that they are not opposed to labor unions; that they have a right to exist and foster their legitimate interest, but then proceed to destroy the advantages accruing to labor from these enactments. Mr. B. A. Green, in "The Legal Aspects of the Labor Movement," 15 **Oregon Law Review** 13 (December, 1935), describes this as follows:

> "The results could not have been different if the courts had consciously and with premeditation adopted as their guide and their belief that, 'though there may be unions, they must not be strong.'"

CONCLUSION.

Respondents respectfully submit that the instant appeal be denied, not only on the basis of the lack of jurisdiction of this Court to entertain this appeal, as set forth in our brief on that question, but also on the merits of the case and on the basis that the appellant has not been deprived of his liberty or property without due process of law, nor has he been denied the equal protection of the laws. The controversy in this case is one between employer and an organization of employees concerning conditions of employment directly affecting the wages and working hours of respondents. The inclusion by the respondents of article III in the proposed agreement and the provisions of section XX, article 6 of the union constitution are for

the sole purpose of furthering the legitimate interests of the members of the union. They are directed to the furtherance of those legitimate interests, are not actuated by malice and are not accompanied by illegal acts. Rather they are accompanied by all the peaceful means at the respondents' disposal. **The fact that because of this dispute there are resultant injuries to the employer is not sufficient for this Court to restrain the otherwise peaceful acts of the respondents, since such injuries arise out of a lawful economic dispute, and as long as the parties to that dispute do not indulge in breach of the peace or acts which are unlawful per se, the resulting injuries become** *damnum absque injuria.*

The fact that there is not an immediate relationship of employer and employee in the instant case is not controlling, since it is not claimed there is any objection on the part of the employees of the appellant to the entering into of a union contract and since the appellant himself has expressed a desire and willingness to enter into such contract, but has refused to do so because of the terms of article III of the proposed agreement. **However, and most important, the relationship of "employers" and "employees", regardless of whether or not they stand in the proximate relationship of employer to employee, and only stand in such relationship as members of the employer and employee groups within the same trade, craft or industry, has always been considered a sufficient basis at law or in equity for the recognition of the propriety and legality of peaceful acts committed in furtherance of disputes or controversies which arise out of the respective interests of such groups.** The law prior to the enactment of the Wisconsin Labor Code, and the Wisconsin Labor Code, are directed toward the peculiar class of disputes

which arise out of the right of laboring men to pursue peacefully the objects for which they organize free from judicial restraint. This Court has repeatedly reaffirmed this proposition and there is no occasion for a reversal of such view at the present time.

Respectfully submitted,

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